

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/301. Meaning of 'will' and 'codicil'.

WILLS (

1. TESTAMENTARY DISPOSITION

(1) INTRODUCTION

(i) Nature and Characteristics of Testamentary Instruments

301. Meaning of 'will' and 'codicil'.

A will or testament¹ is the declaration in a prescribed manner² of the intention of the person making it with regard to matters which he wishes to take effect on or after his death³. A codicil is of similar nature to a will as regards both its purposes and the formalities relating to it, but in general it is supplemental to and considered as annexed to a will previously made, being executed for the purpose of adding to, varying or revoking the provisions of that will⁴. A codicil is nevertheless capable of independent existence, so that the revocation of a will does not necessarily effect the revocation of a codicil to it⁵. The word 'will'⁶, although commonly used to describe one of a series of instruments expressing testamentary intentions, denotes the aggregate formal expression of such intentions of the testator⁷ existing at his death⁸. However, although all wills and codicils subsisting at the testator's death are construed together as one testamentary disposition, they are not construed as one document⁹.

1 It has been said that the expressions 'will' and 'testament' are synonyms and freely used in our law, although by the civil law an instrument was only said to be a testament where an executor was appointed, and, when there was none, a codicil; and, by the common law, where land or tenements were devised in writing, albeit there was no executor named, the instrument was properly called a last will, and, where it only concerned chattels, a testament: see *Shep Touch* (8th Edn) 399. See also *Bac Abr*, Wills and Testaments (A); *Swinburne on Wills* (7th Edn) Pt I ss 1, 2; *Littleton's Tenures* s 167. As early as 1540 the terms appear to be used interchangeably in statutes: see eg 32 Hen 8 c 1 (Wills) (1540) and 34 & 35 Hen 8 c 5 (Wills) (1542-43) (both repealed). See now note 6 infra.

2 As to formalities see PARA 351 et seq post.

3 *Shep Touch* (8th Edn) 399; *Termes de la Ley*, s v Testament; 2 *Bl Com* (14th Edn) 499, explaining the definition of the civil law ('voluntatis nostrae iuxta sententia de eo quod quis post mortem suam fieri velit'), adopted in *A-G v Jones and Bartlett* (1817) 3 Price 368 at 391. The definition is from Modestinus in *Inst XXVIII* 1.1; and see II, 10. As to intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

4 2 *Bl Com* (14th Edn) 500.

5 As to the methods by which a codicil may be revoked see the Wills Act 1837 s 20 (as amended); and PARA 386 post. As to the general principle that revocation of a will does not revoke a codicil by implication see PARA 392 post. See also *Falle v Godfray* (1888) 14 App Cas 70 at 76, PC.

6 For the purposes of the Wills Act 1837, 'will' includes a will or testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power, an appointment by will of a guardian of a child, and any other testamentary disposition: see the Wills Act 1837 s 1 (amended by the Children Act 1989 s 108(5), Sch 13 para 1). As from a day to be appointed, the definition also includes an appointment by will of a representative under the Human Tissue Act 2004 s 4 (not yet in force) (see *MEDICAL PROFESSIONS* vol 30(1) (Reissue) PARA 252); Wills Act 1837 s 1 (prospectively amended by the Human Tissue Act 2004 s 56, Sch 6 para

1). At the date at which this volume states the law, no such day had been appointed. For the purposes of the Law of Property Act 1925 and of the Administration of Estates Act 1925, 'will' includes 'codicil': see the Law of Property Act 1925 s 205(1)(xxxi); and the Administration of Estates Act 1925 s 55(1)(xxviii). As to the appointment by will of guardians of minor children see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148; and as to the exercise of powers by will see POWERS vol 36(2) (Reissue) PARA 297 et seq.

7 'Testator' is used in this title whatever may be the contents of the will, and whether the will disposes of property or not. The terms 'testate', 'intestate', 'testacy' and 'intestacy' in their ordinary sense are associated with the question how far the testator's property is disposed of by the will, whether completely, incompletely or not at all: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 585. In a technical sense, adopted in a court of probate, these terms may be used with reference to the question whether an executor is in existence: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 1.

8 *Lemage v Goodban* (1865) LR 1 P & D 57 at 62; *Green v Tribe* (1878) 9 ChD 231 at 234; *Re Elcom, Layborn v Grover Wright* [1894] 1 Ch 303 at 314, CA; *Douglas-Menzies v Umphelby* [1908] AC 224 at 233, PC (separate Scots and Australian wills to be construed according to the law of those countries respectively); *Re Smith, Prada v Vandroy* [1916] 2 Ch 368, CA ('by this my will' held not to exclude codicils). See also *Lord Walpole v Earl of Cholmondeley* (1797) 7 Term Rep 138 at 146, 150; *Thomas d Jones v Evans* (1802) 2 East 488 at 496; *Stoddart v Grant* (1852) 1 Macq 163 at 171, HL. The phrase 'last will', without more, does not revoke an earlier document: *Cutto v Gilbert* (1854) 9 Moo PCC 131; *Freeman v Freeman* (1854) 5 De GM & G 704; *Pettinger v Ambler, Bunn v Pettinger* (1866) LR 1 Eq 510; *Re De la Saussaye* (1873) LR 3 P & D 42 at 44 ('last and deliberate will'); *Simpson v Foxon* [1907] P 54 ('last and only will'). As to words of revocation see PARA 387 post. As to probate of concurrent wills dealing with the testator's properties in different countries see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 123.

9 As to the construction of wills see PARA 476 et seq post.

UPDATE

301 Meaning of 'will' and 'codicil'

NOTE 6--Day appointed for purpose of conferring power to make orders and regulations: SI 2005/2792.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/302. Essential characteristics.

302. Essential characteristics.

A will is normally made for the purpose of making dispositions of property to take effect on or after the testator's death¹, but it may also be made for the purpose of appointing executors² or other persons whom the testator wishes to manage or assist in managing any part of his estate³, for appointing guardians of his minor children after his death⁴, for exercising any power exercisable by him by will⁵, for revoking or altering any previous will of his⁶, or for any similar purpose⁷ taking effect on or after his death⁸. Every will, however, has this essential characteristic, that during the life of the testator it is a mere declaration of his intention and may be freely revoked or altered in a prescribed manner⁹. Until his death the will is ambulatory, or without a fixed effect, and capable of operating on property which is acquired by the testator after the will is made¹⁰. On his death it crystallises and takes effect as an appointment, disposition or otherwise, according to its tenor¹¹. A gift by will may constitute an associated operation¹² within the meaning of the Income and Corporation Taxes Act 1988¹³.

A will must be distinguished from a disposition made inter vivos, such as a donatio mortis causa which is made in contemplation of the death of the donor in circumstances which show that it is to take effect only in that event¹⁴, or a voluntary settlement with a power of revocation¹⁵, or an instrument which is final on execution by the maker, although intended to

take effect on some future event¹⁶, or a nomination of a beneficiary under the trust deed and rules of a pension scheme operating by reason of the force of that deed and rules¹⁷. A fortiori, an instrument which is not revocable and which comes into operation in the settlor's lifetime is not testamentary¹⁸.

An attempted testamentary disposition cannot be enforced as a declaration of trust¹⁹. The revocable nature of a will cannot be lost, even by a declaration that it is irrevocable²⁰, or by a covenant or contract not to revoke it²¹. After revocation²² the will may, however, be revived in the prescribed manner²³.

1 As to the effect of a will on the property disposed of see PARA 316 post. As to the appointment of trustees for any purpose see TRUSTS vol 48 (2007 Reissue) PARA 804 et seq; and as to their appointment for the purposes of the Settled Land Act 1925, in relation to settlements created before 1 January 1997 or subsequent settlements derived from settlements made before that date, see SETTLEMENTS vol 42 (Reissue) PARA 750 et seq. Subject to certain exceptions, new settlements created on or after 1 January 1997 are not settlements for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

2 Before the Land Transfer Act 1897, a will which did not dispose of personalty and contained no appointment of executors could not be admitted to probate: *Re Drummond* (1860) 2 Sw & Tr 8. As to executors or administrators see generally EXECUTORS AND ADMINISTRATORS.

3 The mere appointment of any assistants or coadjutors to the executors, trustees or persons beneficially entitled has no effect either on the vesting of the property in the executors alone (*Anon* (1346) YB (Rolls Series), 20 Edw 3, Pt II, 428, pl 69), or as imposing on the executors, trustees or persons entitled beneficially under the will a trust or duty to employ the named persons in the specified manner (*Shaw v Lawless* (1838) 5 Cl & Fin 129, HL (appointment of tenant for life's land agent); *Finden v Stephens* (1846) 2 Ph 142 (appointment of trustees' receiver and manager); *Belaney v Kelly* (1871) 24 LT 738; *Foster v Elsley* (1881) 19 ChD 518 (appointment of trustees' solicitor); and see TRUSTS vol 48 (2007 Reissue) PARA 998 et seq; but they, or the court in an administration action, may give effect to such directions (*Hibbert v Hibbert* (1808) 3 Mer 681).

4 As to the appointment by will of guardians of minor children see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148.

5 As to the exercise of powers by will see POWERS vol 36(2) (Reissue) PARA 297 et seq. A will may operate as a revocation of an appointment made by deed: *Re Reilly and Brady's Contract* [1910] 1 IR 258. A residuary gift in a will may operate so as to exercise a general power of appointment (where no contrary intention is expressed): see the Wills Act 1837 s 27 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 532; POWERS vol 36(2) (Reissue) PARA 310.

6 As to alterations see PARA 374 et seq post; and as to revocation see PARA 384 et seq post.

7 Eg a direction to begin proceedings to administer the estate.

8 A direction to begin proceedings to administer the estate in court does not make it imperative on the court to make the order for administration: *Re Stocken, Jones v Hawkins* (1888) 38 ChD 319, CA. Indeed a court would not now make an order for administration unless it was shown to be desirable for the proper administration of the estate. As to directions as to the disposal of the testator's body see PARA 333 post.

9 See PARA 301 ante. As to the required testamentary intention see PARA 350 post; as to revocation see PARA 384 et seq post. As to the incorporation of other documents in a will see PARA 489 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105. Although a will is revocable, any clause in it may be referred to in order to prove a fact: *Re Northcliffe, Arnholz v Hudson* [1925] Ch 651 at 654. As to the restrictions on testamentary disposition or on revocation where a testator has made a binding agreement see PARA 318 et seq post; and see also PARA 328 post.

10 Co Litt 112b; Pollock and Maitland's History of English Law (2nd Edn) 315; *Baugh v Read* (1790) 1 Ves 257 at 260; *Lord Walpole v Earl of Cholmondeley* (1797) 7 Term Rep 138 at 149; *Beddington v Baumann* [1903] AC 13 at 19, HL; *Re Baroness Llanover, Herbert v Freshfield (No 2)* [1903] 2 Ch 330 at 335; *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199 at 205; *Re Berger* [1990] Ch 118 at 129, [1989] 1 All ER 591 at 599, CA. Before the Wills Act 1837, a will did not operate on realty acquired after the will had been made. Although a will is ambulatory and revocable, it must, when executed, be intended to have immediate effect and cannot be executed conditionally on a future event happening: see PARAS 305, 350 post.

11 *Forse and Hembling's Case* (1588) 4 Co Rep 60b; *Re Rye's Settlement* (1852) 10 Hare 106 at 112; *Cooper v Martin* (1867) 3 Ch App 47; *Re Robinson* (1867) LR 1 P & D 384 at 387; *Olivant v Wright* (1878) 9 ChD 646 at 650; *Beddington v Baumann* [1903] AC 13 at 19, HL; 2 Bl Com (14th Edn) 502; Shep Touch (8th Edn) 401. See also *Lord Bindon v Earl of Suffolk* (1707) 1 P Wms 96 at 97 per Lord Cowper LC; *Bunbury v Doran* (1875) IR 9 CL 284 at 286, Ex Ch.

12 For the meaning of 'associated operation' see INCOME TAXATION vol 23(2) (Reissue) PARA 1608.

13 See the Income and Corporation Taxes Act 1988 s 742(1); and *Bambridge v IRC* [1955] 3 All ER 812, [1955] 1 WLR 1329, HL (overruled, without affecting this point, by *Vestey v IRC (No's 1 and 2)* [1980] AC 1148, [1979] 3 All ER 976, HL).

14 See GIFTS vol 52 (2009) PARA 271 et seq.

15 *Tompson v Browne* (1835) 3 My & K 32; *Patch v Shore* (1862) 2 Drew & Sm 589. See also *Alexander v Brame* (1855) 7 De GM & G 525 at 530; on appeal sub nom *Jeffries v Alexander* (1860) 8 HL Cas 594.

16 *Marjoribanks v Hovenden* (1843) Drury temp Sug 11 (appointment on death without issue); *Fletcher v Fletcher* (1844) 4 Hare 67 at 79 (deed of covenant).

17 *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248; *Baird v Baird* [1990] 2 AC 548, [1990] 2 All ER 300, PC.

18 *Thorncroft and Clarke v Lashmar* (1862) 2 Sw & Tr 479; *Re Robinson* (1867) LR 1 P & D 384; *Re Halpin* (1873) IR 8 Eq 567. The Wills Act 1837 applies only to a will or testament in the ordinary meaning of these terms; thus a marriage contract containing a clause which is in reality contractual, although with testamentary effect, is not a 'will' in the sense of that Act: *Battye's Trustee v Battye* 1917 SC 385 at 399.

19 *Cross v Cross* (1877) 1 LR Ir 389; *Towers v Hogan* (1889) 23 LR Ir 53.

20 Bacon's Maxims reg 19; *Vynior's Case* (1609) 8 Co Rep 81b at 82a; *Re McDonald* (1911) 30 NZLR 896. See also PARA 384 post.

21 *Re Heys, Walker v Gaskill* [1914] P 192. As to the effect of such a covenant or contract, which can include raising a trust enforceable against the persons deriving title under a later will of the covenantor or on his intestacy see PARA 319 post; and as to the position in equity where mutual wills are made see PARA 321 post.

22 As to revocation see PARA 384 et seq post.

23 As to revival see PARAS 402-404 post.

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303. Will in form of deed.

If a document bears on its face a testamentary intention, it is not to be considered as a deed merely because it bears a seal or is in other respects in the form of a deed¹; and a deed not intended to have any operation or effect until the grantor's death is testamentary². An instrument which, although in form a conveyance, is made on condition that it is to take effect only on the death of the conveying party is often testamentary in character³. Conversely, the mere fact that a document is executed as a will does not necessarily make it a will⁴.

1 *Marjoribanks v Hovenden* (1843) Drury temp Sug 11 at 27. See also *Hickson v Witham* (1675) Cas temp Finch 195. For the meaning of 'deed' see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 1. Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 7, 32.

2 *Foundling Hospital (Governors and Guardians) v Crane* [1911] 2 KB 367, CA. See also *Rigden v Vallier* (1751) 2 Ves Sen 252 at 258; *Masterman v Maberly* (1829) 2 Hag Ecc 235 at 247; *King's Proctor v Daines* (1830) 3 Hag Ecc 218 at 221; *Re Morgan* (1866) LR 1 P & D 214; *Fielding v Walshaw* (1879) 27 WR 492; *Re Colyer* (1889) 14 PD 48; *Re Slinn* (1890) 15 PD 156; *Re White* (1987) 38 DLR (4th) 631, Ont HC.

3 *Patch v Shore* (1862) 2 Drew & Sm 589 at 598. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 104.

4 *Thorncroft and Clarke v Lashmar* (1862) 2 Sw & Tr 479. See also *King's Proctor v Daines* (1830) 3 Hag Ecc 218.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/304. Instruments partly testamentary.

304. Instruments partly testamentary.

An instrument may be partly testamentary and partly intended to take effect during the life of the person making it¹. Even apart from the testator's intention, a will may have an effect other than testamentary, for example as a memorandum of a contract² under the Statute of Frauds³ or an acknowledgment of a statute-barred debt⁴.

1 *Re Anziani, Herbert v Christopherson* [1930] 1 Ch 407 at 424. See also *Doe d Cross v Cross* (1846) 8 QB 714 (power of attorney intended to be partly testamentary); *Re Robinson* (1867) LR 1 P & D 384 at 387 (lease with a direction to lessor's executors to sell at end of term, not intended to be testamentary); *Wolfe v Wolfe* [1902] 2 IR 246; *Re McDonald* (1911) 30 NZLR 896 (power of attorney).

2 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA (recital in will of a guarantee).

3 See the Statute of Frauds (1677) s 4 (as amended); and CONTRACT vol 9(1) (Reissue) PARA 623; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052. A will can have effect as a memorandum of a contract for the sale of land only if the contract was made before 27 September 1989, the Law of Property Act 1925 s 40 having been repealed in respect of contracts made on or after that date by the Law of Property (Miscellaneous Provisions) Act 1989 ss 4, 5(3), (4)(b), Sch 2: see SALE OF LAND vol 42 (Reissue) PARA 29.

4 *Millington v Thompson* (1852) 3 Ch R 236; *Howard and Crowley v Hennessey and O'Leaky* [1947] IR 336. See also LIMITATION PERIODS vol 68 (2008) PARAS 1185-1186, 1193.

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305. Instruments conditionally testamentary.

An instrument may be conditionally testamentary¹. Thus a testator may refer in his will to some contingency, such as an impending journey by him or his possible death while abroad, or other event, in terms which make the will conditional or limited in operation². The terms may, however, merely import that the contingency is a reason for making the will, in which case the will is not conditional³. If the contingency is coincident with a period of danger to the testator, there is a ground for supposing that the danger was regarded by him only as a reason for making a will⁴. A conditional will is of no effect if the contingency fails⁵, but may take effect free from the contingency in question if re-executed or republished after the contingency has passed⁶. A will can be valid as a conditional will only if the condition appears in the will itself⁷.

1 Eg an instrument may be conditional on the consent of another person: see *Re Smith* (1869) LR 1 P & D 717 (where there was an option to the wife to add a codicil to the will or not).

2 *Parsons v Lanoe* (1748) 1 Ves Sen 189 ('if I die before my return'); *Re Winn* (1861) 2 Sw & Tr 147 ('in case of my decease during my absence'); *Roberts v Roberts* (1862) 2 Sw & Tr 337 ('should anything happen to me on my passage'); *Re Porter* (1869) LR 2 P & D 22 ('should anything happen to me while abroad'); *Re Robinson* (1870) LR 2 P & D 171; *Lindsay v Lindsay* (1872) LR 2 P & D 459; *Re Hugo* (1877) 2 PD 73; *Edmondson v Edmondson* (1901) 17 TLR 397 ('in case I should not return home owing to death'); *Re O'Connor* [1942] 1 All ER 546 (testatrix's will conditional on her predeceasing sister; the condition was here inferred from the wording and surrounding circumstances); *Re Govier* [1950] P 237 (joint will; the phrase 'in the event of our two deaths' held to confine operation of will to simultaneous death by enemy action); *Folds v Abrahart* [2003] EWHC 2550 (Ch), [2003] All ER (D) 322 (Jul), [2004] WTLR 327 (last will of testator if he and his wife 'should die together'; no gift to his wife; the will was held to be conditional on a condition not satisfied). See also *Re Rowland, Smith v Russell* [1963] Ch 1, [1962] 2 All ER 837, CA.

3 *Re Spratt* [1897] P 28. See also *Strauss v Schmidt* (1820) 3 Phillim 209 ('in case I should die'); *Burton v Collingwood* (1832) 4 Hag Ecc 176 ('lest I should die before the next sun'); *Re Thorne* (1865) 4 Sw & Tr 36; *Re Dobson* (1866) LR 1 P & D 88 ('in case of any fatal accident, being about to travel' etc); *Re Martin* (1867) LR 1 P & D 380 ('in the event of my death during a time of removal to hospital ship'); *Re Mayd* (1880) 6 PD 17; *Re Stuart* (1888) 21 LR Ir 105 at 108; *Halford v Halford* [1897] P 36.

4 *Re Spratt* [1897] P 28. See also *Re Pawle, Winter v Pawle* (1918) 34 TLR 437; *Nixon v Prince* (1918) 34 TLR 444 (informal will by soldier on active service admitted to probate with formal will).

5 *Parsons v Lanoe* (1748) 1 Ves Sen 189; *Re Winn* (1861) 2 Sw & Tr 147; *Roberts v Roberts* (1862) 2 Sw & Tr 337; *Re Robinson* (1870) LR 2 P & D 171. For a case where the contingency could still arise when the testator died see *Re Cooper* (1855) Dea & Sw 9.

6 *Parsons v Lanoe* (1748) 1 Ves Sen 189 at 191; *Re Cawthron* (1863) 3 Sw & Tr 417. As to republication of a will see PARA 405 et seq post.

7 There is an important distinction between the conditional execution of a document described as a will (which is not authorised by the Wills Act 1837) and the unconditional execution of a will which in accordance with its terms is conditional in its operation (which is so authorised). A will cannot be executed in escrow: *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA, at 69-70 and 925 per Morritt LJ (will invalid because conditionally executed). See also PARA 350 post.

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306. Evidence of nature of instrument.

In considering whether an instrument is of a testamentary character¹ or is conditionally or unconditionally testamentary, the probate court² construes the will in the manner of a court of construction³, and may receive evidence accordingly⁴; and, further, it may receive extrinsic evidence of the intention of the alleged testator with regard to the character of the instrument⁵.

1 As to the grounds on which probate may be refused, and as to the evidence admissible on such questions, see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 300 et seq.

2 In this title the term 'probate court' is used of any court entertaining, within the scope of its jurisdiction, the grant of probate of a will or of letters of administration with the will annexed, or any question relating to the character of the instrument alleged to be testamentary, or as to the testamentary capacity of a testator, or as to the validity of a will generally, for the purposes of the will being admitted to probate, and such a grant is called the 'probate'. As to the grant of probate or letters of administration generally, including the respective jurisdictions of the Chancery Division and the Family Division in probate matters, and as to the jurisdiction of county courts in contentious probate matters, see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 72 et seq, 274-275. The probate court may have to construe documents for the purpose of deciding which are to be admitted to probate: *Re Thomas, Public Trustee v Davies* [1939] 2 All ER 567; *Re Alford* (1939) 83 Sol Jo 566.

Where the question of what instruments should be admitted to probate is a question of construction, it may be possible to have it determined by construction proceedings instead of by probate proceedings: *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 103 et seq. As to the separation of the functions of the probate court and a court of construction see *Townsend v Moore* [1905] P 66 at 84, 86, 88, CA. For the meaning of 'court of construction' see PARA 476 post. As to the construction of wills see PARA 476 et seq post.

3 The court considers the whole language of the will and the surrounding circumstances: *Re Spratt* [1897] P 28 at 30 per Jeune P; *Re Vines, Vines v Vines* [1910] P 147. See also PARA 481 et seq post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 107.

4 As to the evidence receivable in a court of construction see PARA 481 et seq post.

5 *Re English* (1864) 3 Sw & Tr 586; *Cock v Cooke* (1866) LR 1 P & D 241; *Robertson v Smith* (1870) LR 2 P & D 43; *Re Coles* (1871) LR 2 P & D 362; *Re Slinn* (1890) 15 PD 156; *Re Spratt* [1897] P 28; *Re Vines, Vines v Vines* [1910] P 147 (conditional wills); *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA (conditionally executed will). See also *Re Nosworthy* (1865) 4 Sw & Tr 44; *Gould v Lakes* (1880) 6 PD 1; and PARAS 350, 359 post. As to evidence of the contents of a lost will in a court of probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 110.

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307. Joint wills.

A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties¹ or of their joint property². It is not, however, recognised in English law as a single will³. It is in effect two or more wills, and it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor⁴. Joint wills are now rarely, if ever, made.

1 *Re Piazz-Smyth* [1898] P 7; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Hack* (1930) 169 LT Jo 285; *Re O'Connor* [1942] 1 All ER 546. In *Re Stracey* (1855) Dea & Sw 6, a joint will made by husband and wife operated as an exercise of the wife's power of appointment.

2 *Re Raine* (1858) 1 Sw & Tr 144; *Re Lovegrove* (1862) 2 Sw & Tr 453. A dictum by Lord Mansfield in *Earl of Darlington v Pulteney* (1775) 1 Cowp 260 at 268, that there could not be a joint will, cannot be supported. A joint power of appointment by will may be exercised by a joint will and becomes effective on the death of the survivor, provided that at that time the will remains unaltered: *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585.

3 *Hobson v Blackburn and Blackburn* (1822) 1 Add 274.

4 *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585. See also *Re Stracey* (1855) Dea & Sw 6; *Re Lovegrove* (1862) 2 Sw & Tr 453; *Re Miskelly* (1869) IR 4 Eq 62; *Re Fletcher* (1883) 11 LR Ir 359 (where there was a separate will following and recognising a joint will); *Re Crofton* (1897) 13 TLR 374 (where there was a joint codicil to separate wills); *Re Piazz-Smyth* [1898] P 7; *Re Heys, Walker v Gaskill* [1914] P 192 at 196.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/308. Mutual wills.

308. Mutual wills.

Wills are mutual when the testators confer on each other reciprocal benefits, which may be absolute benefits in each other's property¹, or life interests with the same ultimate disposition of each estate on the death of the survivor². Apparently, a mutual will in the strict sense of the term is a joint will³, but, where by agreement or arrangement similar provisions are made by separate wills, these are also conveniently known as mutual wills⁴. Wills which by agreement confer benefit on persons other than the testators, without the testators conferring benefits on each other, can also be mutual wills⁵. Where there is an agreement not to revoke mutual wills and one party dies having stood by the agreement, a survivor is bound by it⁶.

1 *Stone v Hoskins* [1905] P 194. There may, however, be alternative provisions in case of lapse: *Re Oldham, Hadwen v Myles* [1925] Ch 75. See also *Re Heys, Walker v Gaskill* [1914] P 192.

2 *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, PC; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913.

3 As to joint wills see PARA 307 ante.

4 See *Re Heys, Walker v Gaskill* [1914] P 192 at 196. If each party by mistake executed the wrong will, it was formerly the case that the court would not rectify the error: *Re S--* (1850) 15 LTOS 71; *Re Meyer* [1908] P 353. However, the wills of testators who die on or after 1 January 1983 may now be rectified: see the Administration of Justice Act 1982 s 20; and PARA 408 post. As to joint and mutual wills generally see the full note with references to the American authorities in *Robertson v Robertson* 136 Am St R 589 at 592n (1909); and for cases of mutual wills under community of goods in Roman-Dutch law see *Denysen v Mostert* (1872) LR 4 PC 236 (South Africa); *Dias v De Livera* (1879) 5 App Cas 123, PC (Ceylon); *Natal Bank Ltd v Rood* [1910] AC 570, PC (South Africa).

5 *Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129.

6 See PARA 321 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/309. Delegation of will-making power.

309. Delegation of will-making power.

Although a testator may properly make a will or codicil conditional on the assent of a third person to its taking effect as a testamentary document¹, he may not delegate his will-making power to any other person². Accordingly, if a testator signs a document prepared by another person without knowledge of its contents³, or a document which includes a phrase or even a word inserted by another of which he has no knowledge⁴, then either the document is not a valid will or the phrase or word forms no part of an otherwise valid will, as the case may be.

There is, however, no objection to the testator by his will conferring on his executors either a special⁵ or a general⁶ power, or indeed a certain power of any other description⁷, to select his beneficiaries⁸. Furthermore, since it has now been established that there is in this regard no difference between a power and a trust⁹, there is no objection to a trust to distribute between individuals and corporations, however numerous, indicated by the testator provided that the terms of the trust are conceptually certain¹⁰. A power which would satisfy the requirement of certainty, and thus be valid, if created by deed is valid when created by a will¹¹.

Where, however, the intention of the testator is not to benefit individuals, or corporations with separate legal existence, or unincorporated associations in those cases where this may properly be done¹², whom he defines with sufficient precision, but to forward some particular purpose, the situation is different. Where the estate is to be applied for charitable purposes, then, provided that the intention to benefit charity is apparent, the testator may validly leave it

to his executors to determine to which particular charities his bounty is to be distributed¹³. If, however, the will provides that the estate, or a defined portion of it, is to be applied for non-charitable purposes, whether to be selected by his executors or not, such a provision is invalid¹⁴, and cannot be validated by the fact that the executors have a discretion to devote the gift to such purposes or to such charitable purposes as they think fit¹⁵. The court does not wait to see whether the executors apply the fund to charitable objects, or partly to charitable objects, or not, but looks at the will as at the date of death and decides at once whether the gift is definite or indefinite, and, if it is indefinite, the gift is inoperative¹⁶. The reason for the failure of such a gift is that a gift for a purpose can take effect only by means of a trust, and such trusts are of imperfect obligation, for by their nature they cannot be enforced by or on behalf of any particular beneficiary. Where the testator has failed to create an enforceable trust, his executors cannot do on his behalf what they themselves as individuals would be perfectly free to do¹⁷.

1 *Re Smith* (1869) LR 1 P & D 717 (cited in PARA 305 note 1 ante).

2 *Grimond v Grimond* [1905] AC 124 at 126, HL, per Earl of Halsbury LC; *Houston v Burns* [1918] AC 337 at 342, HL, per Viscount Haldane; *A-G v National Provincial and Union Bank of England* [1924] AC 262 at 268, HL, per Viscount Haldane; *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341 at 348, [1944] 2 All ER 60 at 62, HL, per Viscount Simon LC, at 349 and 62 per Lord Macmillan, at 364 and 70 per Lord Porter, and at 371 and 74 per Lord Simonds. The mere delegation to executors, or to a third person, of the application of a formula laid down by the testator for the ascertainment of his estate does not offend this principle; it is merely a question of 'id certum est quod certum reddi potest': *Re Conn, Conn v Burns* [1898] 1 IR 337 (where a portion was to be determined by a wife and executors according to the value of the services the daughters might have rendered the family and, in the case of marriage portions, according to the match made). See also PARA 555 post.

3 *Hastilow v Stobie* (1865) LR 1 P & D 64; *Cleare and Foster v Cleare* (1869) LR 1 P & D 655 at 657 per Lord Penzance.

4 *Re Morris, Lloyds Bank Ltd v Peake* [1971] P 62, [1970] 1 All ER 1057; *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256; *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037, [1976] 1 WLR 161.

5 *Brown v Higgs* (1803) 8 Ves 561 (affd (1813) 18 Ves 192, HL); *Re Hughes, Hughes v Footner* [1921] 2 Ch 208; *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175.

6 *Gibbs v Rumsey* (1813) 2 Ves & B 294; *Re Hughes, Hughes v Footner* [1921] 2 Ch 208 at 212 per Sargant J.

7 *Re Park, Public Trustee v Armstrong* [1932] 1 Ch 580; *Re Jones, Public Trustee v Jones* [1945] Ch 105. See also *Re Byron's Settlement, Williams v Mitchell* [1891] 3 Ch 474; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *Re Beatty's Will Trusts, Hinvies v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503.

8 See POWERS vol 36(2) (Reissue) PARA 218.

9 *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL (overruling *IRC v Broadway Cottages Trust* [1955] Ch 20, [1954] 3 All ER 120, CA; and applying the tests already laid down for powers in *Wishaw v Stephens* [1970] AC 508, sub nom *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens* [1968] 3 All ER 785, HL). See also TRUSTS vol 48 (2007 Reissue) PARA 655.

10 As to certainty see POWERS vol 36(2) (Reissue) PARA 218; TRUSTS vol 48 (2007 Reissue) PARA 655. As to the liberal view of fiduciary powers for very wide classes of beneficiaries which has in recent years prevailed see *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *Re Beatty's Will Trusts, Hinvies v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503. It seems that *Re Carville, Shone v Walthamstow Borough Council* [1937] 4 All ER 464, where it was held that a provision that the residue should be disposed of 'as my executors think fit' did not create a valid power, is now of questionable authority in view of the decision in *Re Beatty's Will Trusts, Hinvies v Brooke* supra.

11 *Re Beatty's Will Trusts, Hinvies v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503. The idea that there might be a common law rule against testamentary delegation, in the sense of a restriction on the scope of testamentary powers, is a chimera, a shadow cast by the rule of certainty, having no independent existence: *Re Beatty's Will Trusts, Hinvies v Brooke* supra at 849 and 1509 per Hoffmann J.

12 As to gifts to non-charitable societies see PARA 338 post; and TRUSTS vol 48 (2007 Reissue) PARA 607.

13 *Dick v Audsley* [1908] AC 347, HL. See also *A-G v Hickman* (1732) Kel W 34; *White v White* (1778) 1 Bro CC 12; *Moggridge v Thackwell* (1803) 7 Ves 36 (affd (1807) 13 Ves 416, HL); *Re Douglas, Obert v Barrow* (1887) 35 ChD 472, CA; *Re White, White v White* [1893] 2 Ch 41, CA; *Re Willis, Shaw v Willis* [1921] 1 Ch 44, CA; *Re Ludlow, Bence-Jones v A-G* (1923) 93 LJ Ch 30, CA. See also CHARITIES vol 8 (2010) PARA 123.

14 *Hunter v A-G* [1899] AC 309, HL (trust to purchase advowsons); *Dunne v Byrne* [1912] AC 407, PC (money to be used wholly or in part as most conducive to the good of religion in a diocese); *A-G of New Zealand v New Zealand Insurance Co Ltd* [1936] 3 All ER 888, PC (benevolent purposes); *Farley v Westminster Bank Ltd* [1939] AC 430, [1939] 3 All ER 491, HL (parish work). See also *Morice v Bishop of Durham* (1805) 10 Ves 522 (objects of benevolence and liberality); *James v Allen* (1817) 3 Mer 17 (benevolent purposes); *Re Riland's Estate, Phillips v Robinson* [1881] WN 173 (as trustees may think proper); *Re Freeman, Shilton v Freeman* [1908] 1 Ch 720, CA (societies which were in most need of help); *Re Ogden, Taylor v Sharp* (1909) 25 TLR 382, CA (to encourage artistic pursuits or assisting needy students in art); *Re Da Costa, Clarke v Church of England Collegiate School of St Peter* [1912] 1 Ch 337; *Re Rowe, Merchant Taylors' Co v London Corp'n* (1914) 30 TLR 528 (complete discretion in trustees); *Re Moore, Moore v Pope Benedict XV* [1919] 1 IR 316 (to use and apply at the Pope's discretion in the carrying out of the sacred office); *Re Jackson, Midland Bank Executor and Trustee Co Ltd v Archbishop of Wales* [1930] 2 Ch 389; *Re Stratton, Knapman v Stratton* [1931] 1 Ch 197, CA (parochial institutions or purposes); *Re Simson, Fowler v Tinley* [1946] Ch 299, [1946] 2 All ER 220 (benevolent work); *Re Strakosch, Temperley v A-G* [1949] Ch 529, [1949] 2 All ER 6, CA (trust to strengthen bonds of unity between Union of South Africa and the mother country); *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA ('for the purpose of providing some useful memorial to myself'); *Re Atkinson's Will Trusts, Atkinson v Hall* [1978] 1 All ER 1275, [1978] 1 WLR 586 (worthy causes).

15 *Blair v Duncan* [1902] AC 37, HL (charitable or public); *Grimond v Grimond* [1905] AC 124, HL (charitable or religious institutions and societies); *A-G for New Zealand v Brown* [1917] AC 393, PC (charitable, benevolent, religious and educational institutions, societies, associations and objects); *Houston v Burns* [1918] AC 337, HL (public, benevolent or charitable); *A-G v National Provincial and Union Bank of England* [1924] AC 262, HL (patriotic purposes or objects and charitable institutions or objects); *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL (charitable or benevolent). See also *Vezey v Jamson* (1822) 1 Sim & St 69 (charitable or public); *Williams v Kershaw* (1835) 5 Cl & Fin 111n (benevolent, charitable and religious purposes); *Ellis v Selby* (1836) 1 My & Cr 286 (charitable or other); *Re Jarman's Estate, Leavers v Clayton* (1878) 8 ChD 584 (charitable or benevolent); *Re Hewitt's Estate, Gateshead Corp'n v Hudspeth* (1883) 53 LJ Ch 132 (acts of hospitality or charity); *Re Woodgate* (1886) 2 TLR 674 (sick and poor or other utilitarian purposes); *Re Macduff, Macduff v Macduff* [1896] 2 Ch 451, CA (charitable or philanthropic); *Langham v Peterson* (1903) 87 LT 744 (charity or works of public utility); *Re Sidney, Hingeston v Sidney* [1908] 1 Ch 488, CA (charitable or emigration uses); *Re Davidson, Minty v Bourne* [1909] 1 Ch 567, CA (charitable, religious or other societies in connection with the Roman Catholic faith); *Re Eades, Eades v Eades* [1920] 2 Ch 353 (religious, charitable and philanthropic objects); *Re Chapman, Hales v A-G* [1922] 2 Ch 479, CA (charitable or other objects and purposes); *Re Davis, Thomas v Davis* [1923] 1 Ch 225 (charitable or public institutions); *Re Clarke, Bracey v Royal National Lifeboat Institution* [1923] 2 Ch 407 (such other funds, charities and institutions as the executors thought fit); *Reid's Trustees v Cattnach's Trustees* 1929 SLT 608 (charitable, educational or benevolent societies or public institutions); *Re Wood, Barton v Chilcott* [1949] Ch 498, [1949] 1 All ER 1100 (objects of broadcast appeals, of which only some were charitable). See further CHARITIES vol 8 (2010) PARAS 59-67. For a case where the objects were a mixture of charitable purposes and individuals, and the gift was held valid see *Crichton v Grierson* (1828) 3 Bli NS 424, HL; and for a case where a mixture of charitable purposes and named non-charitable institutions were held to be valid objects of a power see *Re Douglas, Obert v Barrow* (1886) 35 ChD 472 (affd (1887) 35 ChD 472 at 480, CA).

16 *Re Jarman's Estate, Leavers v Clayton* (1878) 8 ChD 584 at 587 per Hall V-C.

17 *Leahy v A-G for New South Wales* [1959] AC 457 at 478, [1959] 2 All ER 300 at 307, PC. See also *Re Wood, Barton v Chilcott* [1949] Ch 498, [1949] 1 All ER 1100; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA; *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769; *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Grant's Will Trusts, Harris v Anderson* [1979] 3 All ER 359, [1980] 1 WLR 360.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/310. Foreign element in wills; formal validity.

310. Foreign element in wills; formal validity.

A will, other than a valid international will¹, may be regarded as properly executed either as a result of statute or by common law. By statute, if the execution of a will made on or after 1 January 1964² conforms to the internal law³ in force:

- 1 (1) in the territory where it was executed; or
- 2 (2) in the territory where either at the time of its execution or of the testator's death he was domiciled⁴ or had his habitual residence⁵; or
- 3 (3) in a state⁶ of which, at either of those times, he was a national,

the will is to be treated as properly executed⁷.

At common law, a will of movables is properly executed if its execution complies with the formalities prescribed by the law of the testator's domicile at the time of his death⁸. Compliance with either the internal law of the domicile or the internal law of any system of law referred to by the law of the domicile is sufficient⁹. Similarly, at common law a will of immovables is properly executed if its execution complies with the formal requirements of the *lex situs*¹⁰. Compliance with any system of law referred to by the *lex situs* is probably sufficient¹¹.

1 As to international wills see PARA 312 post.

2 The date of the coming into operation of the Wills Act 1963: see s 7(2).

3 In relation to any territory or state, 'internal law' means the law which would apply in a case where no question of the law in force in any other territory or state arose: *ibid* s 6(1). For the meaning of 'state' see note 6 *infra*. As to cases where there is more than one system of law in any territory or state see s 6(2); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451. As to subsequent changes in the law see s 6(3); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 445.

4 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

5 As to residence see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 57 et seq.

6 For these purposes, 'state' means a territory or group of territories having its own law of nationality: Wills Act 1963 s 6(1).

7 *Ibid* s 1. For these purposes, 'will' includes any testamentary instrument or act; and 'testator' is to be construed accordingly: s 6(1). As to revocation of wills with a foreign element see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 458. As to the construction of wills written in a foreign language see PARA 491 post; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 454.

8 *Enohin v Wylie* (1862) 10 HL Cas 1. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 450.

9 *Collier v Rivaz* (1841) 2 Curt 855. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 450.

10 *Philpston-Stow v IRC* [1961] AC 727, [1960] 3 All ER 814, HL. Cf the Wills Act 1963 s 2(1)(b), which restates the common law rule: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451. As to the application of the *lex situs* to immovables generally see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 399-404.

11 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 450.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/311. Foreign element in wills; essential validity.

311. Foreign element in wills; essential validity.

The material or essential validity of a will of movables is governed by the law of the testator's domicile at the date of his death¹, and that of a will of immovables by the *lex situs*².

In this title it is assumed, unless otherwise stated, that there is no foreign element to consider, and the law stated is the law of England and Wales.

Probate will normally be refused of a will which disposes of property situated entirely abroad³.

¹ *Philipson-Stow v IRC* [1961] AC 727, [1960] 3 All ER 814, HL. See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 456.

² *Freke v Lord Carbery* (1873) LR 16 Eq 461. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 399.

³ See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 122.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/312. International wills.

312. International wills.

An international will is one made in accordance with the requirements of the Annex to the Convention on International Wills¹, which will have the force of law in the United Kingdom when the relevant statutory provisions are brought into force².

A will made in accordance with the requirements of the Annex to the Convention on International Wills is valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile³ or residence⁴ of the testator, if it complies with the provisions set out below⁵. The invalidity of a will as an international will does not, however, affect its formal validity as a will of another kind⁶. These provisions do not, in any event, apply to the form of testamentary dispositions made by two or more persons in one instrument⁷.

The will must be made in writing⁸, and it may be written in any language, by hand or any other means⁹, but it need not be written by the testator himself¹⁰. The testator must declare in the presence of two witnesses and of a person authorised to act in connection with international wills¹¹ that the document is his will, and that he knows its contents¹². He need not inform the witnesses, or the authorised person, of the contents of the will¹³.

The testator must sign the will, or, if he has previously signed it, must acknowledge his signature, in the presence of the witnesses and of the authorised person¹⁴. When the testator is unable to sign, he must indicate the reason to the authorised person who must make note of this on the will¹⁵. Moreover, the testator may be authorised by the law under which the authorised person was designated to direct another person to sign on his behalf¹⁶. The witnesses and the authorised person must there and then attest the will by signing in the presence of the testator¹⁷. The signatures must be placed at the end of the will¹⁸. If the will consists of several sheets, each sheet must be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorised person; and each sheet must be numbered¹⁹.

The date of the will is the date of its signature by the authorised person²⁰, and he must note that date at the end of the will²¹. In the absence of any mandatory rule pertaining to the safe-keeping of the will, the authorised person must ask the testator whether he wishes to make a declaration concerning the safe-keeping of his will. If so, and at the express request of the testator, the place where he intends to have his will kept must be mentioned in the prescribed certificate²².

The authorised person must attach to the will a certificate in the prescribed form²³ establishing that the above obligations have been complied with²⁴. He must keep a copy of this certificate,

and deliver another to the testator²⁵. In the absence of evidence to the contrary, the certificate is conclusive of the formal validity of the instrument as a will in accordance with these provisions²⁶. The absence or irregularity of a certificate does not, however, affect the formal validity of a will made under these provisions²⁷.

An international will certified by virtue of these provisions may be deposited in a depository provided²⁸ by the registering authority²⁹.

An international will is subject to the ordinary rules relating to revocation of wills³⁰.

In interpreting and applying these provisions, regard must be had to their international origin and to the need for uniformity in their interpretation³¹.

1 'The Convention on International Wills' means the Convention providing a Uniform Law on the Form of an International Will (Washington, 26 October to 31 December 1973; Misc 9 (1975); Cmnd 5950): Administration of Justice Act 1982 s 27(3). The Annex to that Convention is set out in the Administration of Justice Act 1982 Sch 2: s 27(2). Sections 27, 28 and Sch 2 are to come into operation on such day as the Lord Chancellor and the Secretary of State may by order jointly appoint: s 76(5), (6)(b). Such an order must be made by statutory instrument (s 76(7)); and may appoint different days for different provisions and for different purposes (s 76(8)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. As to the office of Secretary of State see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355.

2 Administration of Justice Act 1982 s 27(1).

3 As to domicile see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq.

4 As to residence see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 57 et seq.

5 Convention on International Wills Annex art 1(1).

6 Ibid art 1(2). As to the formal validity of foreign wills see PARA 310 ante.

7 Ibid art 2. As to joint wills see PARA 307 ante.

8 Ibid art 3(1).

9 Ibid art 3(3).

10 Ibid art 3(2).

11 The persons authorised to act in the United Kingdom in connection with international wills are solicitors and notaries public: Administration of Justice Act 1982 s 28(1). A person authorised to do notarial acts in any foreign country or place (ie under the Commissioners for Oaths Act 1889 s 6(1) (as amended): see CIVIL PROCEDURE vol 11 (2009) PARA 1027) is authorised to act there in connection with international wills: Administration of Justice Act 1982 s 28(2). A diplomatic agent or consular officer of any state may, if authorised to do so under the laws of that state, administer oaths and take affidavits and do notarial acts in connection with an international will: Consular Relations Act 1968 s 10(1)(c), (4) (prospectively amended by the Administration of Justice Act 1982 s 28(7)). As to the commencement of these provisions see note 1 supra.

12 Convention on International Wills Annex art 4(1).

13 Ibid art 4(2).

14 Ibid art 5(1).

15 Ibid art 5(2).

16 Ibid art 5(2). As to the signing of a will on behalf of the testator see PARA 355 post.

17 Ibid art 5(3).

18 Ibid art 6(1). Cf, however, art 15 (see the text to note 31 infra) and the authorities set out in PARA 357 post, which perhaps can no longer be relied on in this context.

19 Ibid art 6(2). Presumably the numbering must be consecutive, commencing with the number 1.

20 Ibid art 7(1).

21 Ibid art 7(2).

22 Ibid art 8. As to the certificate see the text to notes 23-27 *infra*. As to the provision of official depositories for wills see PARA 314 post. See also the text and note 28-29 *infra*.

23 The certificate drawn up by the authorised person must be in the form set out in *ibid* art 10 or in a substantially similar form: art 10. In addition to certifying compliance with these requirements, it also certifies that the maker of the certificate has satisfied himself as to the identity of the testator and the witnesses, and that those witnesses meet the conditions requisite for acting as such according to the law under which the maker of the certificate is acting. As to the capacity of witnesses under English law see PARA 370 post.

24 Ibid art 9.

25 Ibid art 11.

26 Ibid art 12.

27 Ibid art 13.

28 *Ie* a depository maintained under the Administration of Justice Act 1982 s 23 (as amended): see PARA 314 post. Section 23 (as amended) accordingly has effect in relation to international wills: s 28(4). Regulations under s 25 (see PARA 314 post) have effect in relation to such international wills as they have effect in relation to wills deposited under s 23 (as amended) (see PARA 314 post) (s 28(5)); but, without prejudice to the generality of s 25, regulations under s 25 may make special provision with regard to such international wills (s 28(6)).

29 Ibid s 28(3). As to the registering authority see PARA 314 post.

30 Convention on International Wills Annex art 14. As to rules relating to revocation of wills with a foreign element see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 458-459. As to revocation generally see PARA 379 *et seq* post.

31 Ibid art 15.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/313. Safe-keeping of wills; existing provisions.

313. Safe-keeping of wills; existing provisions.

Safe and convenient depositories for the custody of the wills of living persons are required to be provided under the control and direction of the High Court; and any person may deposit his will in such a depository on payment of the prescribed fee¹ and subject to such conditions as may from time to time be prescribed by regulations made by the President of the Family Division with the concurrence of the Lord Chancellor².

As from a day to be appointed this system of registration is to be replaced³ and any will already deposited in accordance with this system⁴ will be treated as if it has been deposited under the new provisions⁵.

The safety of wills is protected by the criminal law⁶.

1 *Ie* the fee prescribed by an order under the Courts Act 2003 s 92: Supreme Court Act 1981 s 126(1) (amended by the Courts Act 2003 s 109(1), Sch 8 para 262(b); prospectively repealed). As from a day to be appointed, the Supreme Court Act 1981 s 126 (as amended) is prospectively repealed by the Administration of Justice Act 1982 s 75, Sch 9 Pt I. At the date at which this volume states the law, no such day had been appointed. As to fees see also Tristram and Coote's Probate Practice (29th Edn) 507 *et seq*.

2 Supreme Court Act 1981 s 126(1) (prospectively repealed). Any regulations must be made by statutory instrument which must be laid before Parliament after being made; and the Statutory Instruments Act 1946 (see STATUTES vol 44(1) (Reissue) PARA 1501 et seq) applies to a statutory instrument containing regulations so made in like manner as if they had been made by a Minister of the Crown: Supreme Court Act 1981 s 126(2) (prospectively repealed). At the date at which this volume states the law no such regulations had been made but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Wills (Deposit for Safe Custody) Regulations 1978, SI 1978/1724, have effect as if so made. The Principal Registry of the Family Division is the depository: regs 2(2), 3(1). As to the custody of wills by the Public Trustee on his appointment as custodian trustee see TRUSTS vol 48 (2007 Reissue) PARA 796; and as to the powers of the Court of Protection in relation to testamentary papers of a person suffering from mental disorder see MENTAL HEALTH vol 30(2) (Reissue) PARA 750 et seq. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

3 See note 1 supra; and PARA 314 post.

4 If any will deposited under the Supreme Court of Judicature (Consolidation) Act 1925 s 172 (repealed), or under the Supreme Court Act 1981 s 126.

5 Administration of Justice Act 1982 s 23(5)(a). At the date at which this volume states the law, no day had been appointed for the commencement of this provision.

6 As to offences of destroying, defacing or concealing a will see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 317. As to the offence of forgery see the Forgery and Counterfeiting Act 1981 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 346-347.

UPDATE

313 Safe-keeping of wills; existing provisions

NOTES 1, 2, 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 2--The Lord Chancellor's function under the 1981 Act s 126 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(i) Nature and Characteristics of Testamentary Instruments/314. Safe-keeping of wills; new provisions.

314. Safe-keeping of wills; new provisions.

As from a day to be appointed¹, the Principal Registry of the Family Division of the High Court of Justice is to be the registering authority² charged with the duty of providing and maintaining safe and convenient depositories for the custody of wills of living persons³, in which any person may deposit his will in accordance with the appropriate regulations⁴ and on payment of the prescribed fee⁵.

It is the duty of the registering authority to register in accordance with such regulations any will deposited in a depository maintained by it⁶, and any other will whose registration is requested under the Registration Convention⁷.

The Principal Registry of the Family Division is to be the national body for the purposes of the Registration Convention⁸.

Regulations⁹ may make provision:

- 4 (1) as to the conditions for the deposit of a will¹⁰;

- 5 (2) as to the manner of and procedure for the deposit and registration of a will, the withdrawal of a will which has been deposited, and the cancellation of the registration of a will¹¹; and
- 6 (3) as to the manner in which the registering authority is to perform its functions as the national body under the Registration Convention¹².

Such regulations may contain such incidental or supplementary provisions as the authority making the regulations considers appropriate¹³. They must be made by statutory instrument, and must be laid before Parliament after being made¹⁴.

1 The Administration of Justice Act 1982 ss 23-25 are to come into operation on such day as the Lord Chancellor and the Secretary of State may by order jointly appoint: s 76(5), (6)(a). Such an order must be made by statutory instrument (s 76(7)); and may appoint different days for different provisions and for different purposes (s 76(8)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the Secretary of State see PARA 312 note 1 ante.

2 Ibid s 23(1)(a).

3 Ibid s 23(2). As to the treatment of wills deposited under earlier enactments see PARA 313 text and note 3 ante.

4 The regulations made under ibid s 25: see the text and notes 9-14 infra.

5 Ibid s 23(3). For these purposes, 'prescribed' means prescribed by an order under the Courts Act 2003 s 92: Administration of Justice Act 1982 s 23(6)(a) (amended by the Courts Act 2003 s 109(1), Sch 8 para 270).

6 Administration of Justice Act 1982 s 23(4)(a).

7 Ibid s 23(4)(b). The registration may be requested under the Registration Convention art 6. 'The Registration Convention' means the Convention on the Establishment of a Scheme of Registration of Wills (Basle, 16 May 1972; Misc 30 (1972); Cmnd 5073): Administration of Justice Act 1982 s 24(2).

8 Ibid s 24(1). Accordingly, the Principal Registry of the Family Division is to have the functions assigned to the national body by the Registration Convention and, without prejudice to those general functions, the functions of arranging for the registration of wills in other contracting states, and of receiving and answering requests for information arising from the national bodies of other contracting states: Administration of Justice Act 1982 s 24(1)(a), (b).

9 The regulations are to be made by the President of the Family Division, with the concurrence of the Lord Chancellor: ibid s 25(3)(a). See, however notes 12, 14 infra.

10 Ibid s 25(1)(a).

11 Ibid s 25(1)(b).

12 Ibid s 25(1)(c). Regulations made by virtue of s 25(1)(c) are to be made by the Lord Chancellor: s 25(4).

13 Ibid s 25(2).

14 Ibid s 25(5). The Statutory Instruments Act 1946 (see STATUTES vol 44(1) (Reissue) PARA 1501 et seq) applies to a statutory instrument containing regulations made in accordance with the Administration of Justice Act 1982 s 25(3)(a) (see the text and note 9 supra) as if the regulations had been made by a Minister of the Crown: s 25(7). Any regulations made under the Supreme Court of Judicature (Consolidation) Act 1925 s 172 (repealed) or the Supreme Court Act 1981 s 126 (see eg the Wills (Deposit for Safe Custody) Regulations 1978, SI 1978/1724, which have effect as if so made) are to have effect for the purposes of the Administration of Justice Act 1982 Pt IV (ss 17-28) (as amended) as they have effect for the purposes of the enactment under which they were made: s 25(8).

UPDATE

314 Safe-keeping of wills; new provisions

NOTE 9--The Lord Chancellor's function under the 1982 Act s 25(3)(a) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTE 12--1982 Act s 25(4) amended, s 25(9) added: Constitutional Reform Act 2005 Sch 4 para 148.

NOTE 14--Supreme Court Act 1981 now cited as Senior Courts Act 1981: 2005 Act Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(ii) Devolution of Property under Testamentary Disposition/315. Paramount title of the personal representatives.

(ii) Devolution of Property under Testamentary Disposition

315. Paramount title of the personal representatives.

English law has adopted generally, in relation to wills, the distinction between the legal and equitable title to the property of the testator. At law the sole legal title to the testator's property, both real¹ and personal², devolves, notwithstanding his testamentary dispositions³, on his personal representatives for the purpose of administration of his estate⁴. The dispositions contained in the will take effect in equity only, that is to say that the devisees or legatees only have rights, enforceable in a court of equity, against the personal representatives as legal owners⁵. Realty devised by the will requires an assent or conveyance by the personal representatives to vest it in the devisee, and personalty bequeathed by the will requires their assent to vest it in the legatee⁶.

1 Before 1 January 1898, when the Land Transfer Act 1897 s 1 (now replaced in an extended form by the Administration of Estates Act 1925 s 1(1)) came into force, realty passed directly to the devisee, or, in the case of intestacy, to the heir: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363.

2 This includes leaseholds ('chattels real'): see *Wind v Jekyl* (1719) 1 P Wms 572.

3 It is the practice to use 'devise' to denote a gift of realty and 'bequest' or 'legacy' to denote a gift of personalty, the person or other object taking a benefit under a gift of realty or personalty being called respectively a 'devisee' or a 'legatee' (see eg *Ellard v Phelan* [1914] 1 IR 76); but 'devise' was formerly often used with respect to gifts by will of leaseholds ('chattels real') and other personalty (see eg *Hopewell v Ackland* (1710) 1 Salk 239; *Tilley v Simpson* (1746) 2 Term Rep 659n), and its use in a will is not in itself conclusive to show that the testator is dealing with realty (*Camfield v Gilbert* (1803) 3 East 516 at 521; *Hall v Hall* [1891] 3 Ch 389 at 393 (affd [1892] 1 Ch 361, CA)), although that prima facie is its meaning (*Phillips v Beal* (1858) 25 Beav 25). It is often used of leaseholds. Conversely, 'bequest' or 'legacy' may in a proper context carry realty: see PARA 575 post. As to the origin of the term 'bequest' see 2 Pollock and Maitland's History of English Law (2nd Edn) 338. 'Gift' includes devise and bequest, and 'donee' includes devisee and legatee, or other object of the testator's bounty in any kind of property. The term 'gift over' is commonly used to describe a gift in succession to a prior gift, especially by way of executory devise or bequest: see PARA 731 et seq post. 'Limitation' is commonly used to describe a gift of a limited interest, or one of a series of gifts of the same property to persons in succession.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 335 et seq.

5 The Wills Act 1837 takes effect to enable equitable interests to be disposed of subject, and without prejudice, to the estate and powers of a personal representative: Law of Property (Amendment) Act 1924 s 9, Sch 9 para 3. While the estate of a deceased person is in the course of administration, the beneficiaries interested in the residuary estate have a right to have the estate properly administered, but do not have equitable interests in the assets comprised in the estate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 341. As to the payment of inheritance tax see INHERITANCE TAXATION. As to property appointed by will which devolves on the personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 372-373.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 559 et seq. As to an assent or conveyance in regard to realty see the Administration of Estates Act 1925 s 36 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 567. It seems that a devise conditional on the payment of a legacy, the legatee having an express right of entry to secure the payment (a right formerly said to be in the nature of a tenancy by elegit: see *Johns v Pink* [1900] 1 Ch 296; *Wigg v Wigg* (1739) 1 Atk 382 at 383; *Emes v Hancock* (1743) 2 Atk 507 at 508; *Sherman v Collins* (1745) 3 Atk 319 at 322), would be effected by the executor making the assent subject to an equitable right of entry by the legatee: see the Law of Property Act 1925 ss 1(2)(e), 4(3). This would not prevent the devisee from obtaining a fee simple absolute, so as to have the legal estate: see s 7(1) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). As to the limitation of actions against personal representatives to recover benefits given by will see LIMITATION PERIODS vol 68 (2008) PARA 1161.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(ii) Devolution of Property under Testamentary Disposition/316. Effect of will on property.

316. Effect of will on property.

As a disposition of his property, a will is subject to any subsequent disposition inter vivos by the testator in his lifetime¹, and to any order made by the court for the maintenance of a spouse, former spouse, cohabitee, child or dependant under the Inheritance (Provision for Family and Dependents) Act 1975². A disposition made by a will need not come into operation immediately on the testator's death, but, to the extent that such dispositions are allowed, may take effect at a future time³. The dispositions in the will take effect subject to the rules as to payment of debts and liabilities⁴ and the presumptions as to the order of payment of legacies and the construction of expressions giving legacies priority⁵, or affecting the order of application of assets in the payment of debts or legacies⁶, or charging annuities on capital or income⁷. The usual rules and presumptions may, however, be displaced if the testator shows an intention to displace them⁸.

1 As to ademption see PARAS 445-449 post.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq. The category of cohabitee (ie someone who, during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased) was introduced in relation to persons dying on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 2, amending the Inheritance (Provision for Family and Dependents) Act 1975 s 1. As from a day to be appointed, provision may also be made for civil partners: see s 1 (prospectively amended by the Civil Partnership Act 2004 s 71, Sch 4 Pt 2 para 15). At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post.

3 See *Re Newns* (1861) 7 Jur NS 688 (where a disposition by writing to take effect two years after the death of the testator's wife was held testamentary). As to executory devises see REAL PROPERTY vol 39(2) (Reissue) PARAS 173-178; and as to executory bequests see PARAS 411-412 post. As to the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1027, 1030-1031.

4 As to the payment of debts by the personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 384 et seq.

5 As to the priority of legacies etc see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 506 et seq; RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 806.

6 As to the exclusion of the statutory order for payment of debts see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 410-411; as to secured and unsecured debts see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 414-415; as to the order in payment of debts see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 416 et seq; and as to the order of application of assets see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 525 et seq.

7 As to charging capital or income see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 825-830.

8 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 384, 410-411. See also eg *Re Scholfield's Will's Trusts, Scholfield v Scholfield* [1949] Ch 341, [1949] 1 All ER 490 (treatment of war damage value payments as capital or income). As to administration of the assets generally see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 374 et seq.

UPDATE

316 Effect of will on property

NOTE 2--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(ii) Devolution of Property under Testamentary Disposition/317. Conditions of an effectual gift by will.

317. Conditions of an effectual gift by will.

The following are necessary conditions that a gift by will may be effectual to confer a title to the property given on the donee¹:

- 7 (1) the testator must be dead²;
- 8 (2) the testator must have been a person who at the date of the will had the legal capacity to make a will³;
- 9 (3) at the time of making the will the testator must have had the intention to make it, so as to take effect on his death⁴, the gift being defeated if the testator's mind was not free and unaffected by fear, fraud or undue influence, or want of knowledge and approval, or by any other matters which by law vitiate his intention⁵;
- 10 (4) the will must be made in the form and manner required by law⁶;
- 11 (5) the gift must not have been revoked⁷ or altered⁸, or nullified by divorce⁹, or, if revoked, must have been revived before the death of the testator¹⁰;
- 12 (6) probate of the will or letters of administration with the will annexed must be obtained¹¹;
- 13 (7) the words used by the testator in making the gift must be sufficient to make his intention capable of being ascertained¹²;
- 14 (8) the subject matter of the gift described by the testator must be ascertainable and capable of being disposed of by the will of the testator¹³, or, if not, the gift must be validated under the equitable doctrine of election¹⁴, or otherwise;
- 15 (9) the donee described by the testator must be ascertainable and capable by law of taking the benefit of the gift¹⁵;
- 16 (10) the gift so intended must be consistent with law¹⁶, or must be capable of being effectuated in a manner consistent with the law¹⁷;
- 17 (11) the gift must be assented to or given effect to by the personal representatives of the testator¹⁸;
- 18 (12) all other conditions precedent imposed by the testator or by law must be performed¹⁹.

1 See Shep Touch (8th Edn) 413. As to the failure of a gift on other grounds see PARAS 410, 442 et seq post.

2 *Thorp v Tomson* (1588) 2 Leon 120. See also PARA 302 ante.

3 As to the legal capacity to make a will see PARA 323 et seq post.

- 4 See PARA 350 post. As to the effect of the will being read over to the testator see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 317.
- 5 As to want of knowledge and approval see PARA 325 post; and as to gifts obtained by undue influence or fraud see PARA 340 post. Such matters are grounds for refusing probate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 300 et seq.
- 6 As to the form of wills made in England and Wales see PARA 349 post; and as to the form of wills made abroad see PARA 310 ante.
- 7 As to revocation see PARA 379 et seq post.
- 8 As to the effect of codicils see PARA 301 ante; and as to alterations and erasures see PARA 374 et seq post.
- 9 As to the effect of divorce see PARAS 468-469 post. As to civil partnerships see PARAS 382, 470 post.
- 10 See PARA 402 et seq post.
- 11 As to probate generally see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 103 et seq. Statutory penalties are imposed on any person who takes possession of and in any way administers the testator's property without obtaining a grant (although no penalty is in practice exacted unless there is a liability to inheritance tax): see *Re Commercial Bank Corp'n of India and the East, Fernandes' Executors Case* (1870) 5 Ch App 314 at 317; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 64. As to inheritance tax see INHERITANCE TAXATION.
- 12 As to the construction of wills generally see PARA 476 et seq post.
- 13 As to property capable of being disposed of see PARA 327 et seq post; and as to the interests which may be created see PARA 411 et seq post.
- 14 See EQUITY vol 16(2) (Reissue) PARA 724 et seq.
- 15 As to the capacity to benefit under a will see PARA 335 et seq post.
- 16 As to the interests created see PARA 409 post. As to the legal incidents of a gift, and as to the necessity for an assent, see generally para 411 et seq post. As to settled gifts see SETTLEMENTS vol 42 (Reissue) PARA 630.
- 17 As to the cy-près doctrine and similar rules see PARA 521 et seq post.
- 18 As to the effect of a will in passing the property to the personal representatives see PARA 315 ante; and as to executory trusts see TRUSTS vol 48 (2007 Reissue) PARAS 669-671.
- 19 As to vesting of conditional interests see PARA 696 et seq post. As to the entitlement to registration of a personal representative on the death of the proprietor of registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 921. Certain types of property may be subject to additional legal requirements: see eg MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 606 (lead mines in Derbyshire).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(iii) Restrictions on Freedom of Testamentary Disposition/318. Restriction by contract, trust or estoppel.

(iii) Restrictions on Freedom of Testamentary Disposition

318. Restriction by contract, trust or estoppel.

Although a will is always revocable¹, and the last will of a testator, notwithstanding any agreement, always remains his will, he may nevertheless bind himself personally by an agreement as to the contents of his will, and may so bind his assets by that agreement that a person deriving title under his will or intestacy is a trustee for the performance of that agreement². The same may come about through accepting a gift of property subject to a trust

to make a testamentary disposition of it in a particular way³, or by acting in such a way as to confer other rights under the doctrine of proprietary estoppel⁴.

1 See PARA 302 ante. As to revocation see PARA 379 et seq post.

2 *Dufour v Pereira* (1769) 1 Dick 419, as reported sub nom *Durour v Perraro* 2 Hargrave's Juridical Arguments 304 at 309 (cited in *Stone v Hoskins* [1905] P 194 at 196-197 and in *Re Dale, Proctor v Dale* [1994] Ch 31 at 40, [1993] 4 All ER 129 at 135). See also *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913. As to a covenant not to revoke a will see PARA 319 post. Cf *Re Turner, Turner v Turner* (1902) 4 OLR 578 (where there was a devise on condition that the devisee made a will in favour of the testator's children). See also *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190. As to mutual wills see PARA 308 ante.

3 *Ottaway v Norman* [1972] Ch 698, [1971] 3 All ER 1325; *Healey v Brown* [2002] All ER (D) 249 (Apr), [2002] WTLR 849.

4 *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Wayling v Jones* (1993) 69 P & CR 170, CA; *Durant v Heritage* [1994] EGCS 134; *Price v Hartwell* [1996] EGCS 98, CA; but cf *Taylor v Dickens* [1998] 1 FLR 806 (cited in PARA 319 note 1 post); *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501, [2002] WTLR 367; *Grundy v Ottey* [2003] WTLR 1253, sub nom *Ottey v Grundy* [2003] All ER (D) 05 (Aug), CA; *Uglov v Uglov* [2004] EWCA Civ 987, [2004] WTLR 1183. As to proprietary estoppel see ESTOPPEL vol 16(2) (Reissue) PARA 959.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(iii) Restrictions on Freedom of Testamentary Disposition/319. Enforceability.

319. Enforceability.

As against persons deriving title as volunteers under the testator the court may order specific performance of a contract duly put into writing (if of a kind where writing is required)¹ to make an ascertainable gift² by will, if valuable consideration was given and specific performance is in the circumstances an appropriate remedy³. If the interest given is an interest in land, the court may order the personal representatives to convey the property according to the contract, and, under the Trustee Act 1925, may make a vesting order⁴, or, if it is more convenient to do so, appoint a person to convey the property⁵. The court also has power to award damages, and may do so even during the lifetime of the testator, where there has been an anticipatory breach and he has put it out of his power to perform the agreement⁶. A mere representation of intention to leave property by will, not amounting to a contract, is not enforceable⁷, unless it gives rise to rights under the doctrine of proprietary estoppel⁸.

A covenant not to revoke a will is not normally⁹ enforceable where the breach is occasioned by the marriage of the covenantor since the covenant does not extend to a case where revocation results as a matter of law¹⁰, but in other respects there is no difference between such a contract and other agreements relating to wills as regards their binding effect¹¹. The covenantor's estate is not liable in damages if the provision made by him in pursuance of the contract is defeated by circumstances over which he has no control¹².

A covenant to bequeath a specific sum or devise or bequeath a specific property constitutes a debt against the covenantor's estate¹³, but a covenant to bequeath a share of the estate is satisfied by a bequest of a share of residue to the covenantee, who is then in the same position as any other legatee as regards debts and lapse¹⁴.

If there is an application under the Inheritance (Provision for Family and Dependents) Act 1975 in relation to a deceased person's estate, the court has power to reduce or nullify the effect of any contract by the deceased to leave property by will which was intended to defeat an application under that Act¹⁵.

1 If the contract is to give land or an interest in land by will, and was made before 27 September 1989, the contract must be evidenced in writing under the Law of Property Act 1925 s 40 (repealed by the Law of Property (Miscellaneous Provisions) Act 1989 ss 4, 5(3), (4)(b), Sch 2), subject to the equitable doctrine of part performance: *Humphreys v Green* (1882) 10 QBD 148, CA; *Maddison v Alderson* (1883) 8 App Cas 467, HL; *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286 (letter constituting offer and oral acceptance sufficient); *National Provincial Bank Ltd v Moore* (1967) 111 Sol Jo 357 (no writing so claim failed); *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC (codicil constituted a written memorandum). See further CONTRACT vol 9(1) (Reissue) PARA 624; SALE OF LAND vol 42 (Reissue) PARA 29 et seq.

In relation to any contract to give land or an interest in land by will made on or after 27 September 1989, the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) applies instead of the Law of Property Act 1925 s 40 (repealed). The Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) requires such a contract to be in writing, to contain all the terms which have been agreed (but this can be by reference to another document), and to be signed by or on behalf of all parties (unless there is exchange of copies signed by the respective parties): see SALE OF LAND vol 42 (Reissue) PARA 29. See also *Taylor v Dickens* [1998] 1 FLR 806 (attempt to enforce contract to make a will failed for (among other reasons) lack of compliance with the Law of Property (Miscellaneous Provisions) Act 1989 s 2); *Healey v Brown* [2002] All ER (D) 249 (Apr), [2002] WTLR 849 (wills disposing of land and expressed to be mutual wills were held not effective as such because the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 were not complied with; although partly effective as giving rise to a constructive trust).

2 See *Hammersley v Baron De Biel* (1845) 12 Cl & Fin 45; *Maunsell v White* (1854) 4 HL Cas 1039; *Laver v Fielder* (1862) 32 Beav 1; *Coverdale v Eastwood* (1872) LR 15 Eq 121; *Re Allen, Hincks v Allen* (1880) 49 LJ Ch 553; *Maddison v Alderson* (1883) 8 App Cas 467, HL; *Re Hudson, Creed v Henderson* (1885) 54 LJ Ch 811; *Vincent v Vincent* (1887) 56 LT 243, CA; *Synge v Synge* [1894] 1 QB 466, CA; *Re Fickus, Farina v Fickus* [1900] 1 Ch 331; *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286; *Wakeham v Mackenzie* [1968] 2 All ER 783, [1968] 1 WLR 1175; *Walker v Claridge* (1968) 207 Estates Gazette 341; *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC. In *O'Sullivan v National Trustees, Executors and Agency Co of Australasia Ltd* [1913] VLR 173, an agreement to provide for the donee so that she would have to work no more was held sufficiently certain. Cf *Kay v Crook* (1857) 3 Sm & G 407 (where an agreement to recognise a son in common with the rest of the family was held uncertain). In *Taylor v Dickens* [1998] 1 FLR 806, it was held that what must be shown is not only a contract to make a will but also a contract not to revoke it; but cf *Schaefer v Schuhmann* supra at 587-593 and 628-633.

3 See SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 837. Such contracts, if purely voluntary, are not as a rule enforceable in equity: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 59; EQUITY vol 16(2) (Reissue) PARA 610. As to a contract by a married woman to exercise a general power of appointment by will see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 237; and as to covenants to appoint by will in exercise of a power see POWERS vol 36(2) (Reissue) PARA 285.

4 See the Trustee Act 1925 ss 48, 49; and TRUSTS vol 48 (2007 Reissue) PARAS 877, 883.

5 See *ibid* s 50; and TRUSTS vol 48 (2007 Reissue) PARA 879.

6 *Synge v Synge* [1894] 1 QB 466 at 470, CA; *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286 (damages for breach of agreement to allow plaintiffs to live rent-free in defendant's house during life of defendant and to leave house to female plaintiff and her sister and daughter). See also *Goilmer v Battison* (1682) 1 Vern 48, sub nom *Goylmer v Paddiston* (1682) 2 Vent 353; *Anon* (1710) 5 Vin Abr 292, Condition (Ed) 38; *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC. As to remedies for anticipatory breach of contract generally see CONTRACT vol 9(1) (Reissue) PARA 1005.

7 *Re Fickus, Farina v Fickus* [1900] 1 Ch 331 at 334. See also SETTLEMENTS vol 42 (Reissue) PARA 643.

8 See PARA 318 text and note 4 ante.

9 Such a covenant may be enforceable against personal representatives as a trust: see PARA 321 post.

10 *Re Marsland, Lloyds Bank Ltd v Marsland* [1939] Ch 820, [1939] 3 All ER 148, CA. In *Robinson v Ommanney* (1883) 23 ChD 285 at 286-287, CA, such a covenant was said to be bad in so far as it was in restraint of marriage, although it was divisible and enforceable as regards revocation by other means. It is not necessary, however, to rely on this ground: see *Re Marsland, Lloyds Bank Ltd v Marsland* supra. In *Re Goodchild, Goodchild v Goodchild* [1996] 1 All ER 670, [1996] 1 WLR 694 (the point not being considered on appeal at [1997] 3 All ER 63, [1997] 1 WLR 1216, CA), it was held that *Re Marsland, Lloyds Bank Ltd v Marsland* supra did not apply to an agreement to make mutual wills, with the consequence that marriage of the surviving party to such an agreement does not make it cease to be legally binding. Revocation of a will is not necessarily effected by marriage: see PARAS 380-381 post.

11 *Dufour v Pereira* (1769) 1 Dick 419, as reported sub nom *Durour v Perraro* 2 Hargrave's Juridical Arguments 304 at 309 per Lord Camden LC (cited in *Stone v Hoskins* [1905] P 194 at 196-197); *Re Oldham, Hadwen v Myles* [1925] Ch 75 at 84; *Gray v Perpetual Trustee Co Ltd* [1928] AC 391 at 399, PC; *Re Dale, Proctor v Dale* [1994] Ch 31 at 40, [1993] 4 All ER 129 at 135. See also *Robinson v Ommanney* (1883) 23 ChD 285, CA; *Jopling v Jopling* (1909) 8 CLR 33.

12 Eg by lapse: see *Re Brookman's Trust* (1869) 5 Ch App 182; *Jervis v Wolferstan* (1874) LR 18 Eq 18 (liability to refund to meet liabilities). See also *Jones v How* (1850) 7 Hare 267; and PARA 321 post.

13 *Eyre v Monro* (1857) 3 K & J 305; *Graham v Wickham* (1862) 31 Beav 447; *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC.

14 *Ennis v Smith* (1839) Jo & Car 400; *Rowan v Chute* (1861) 13 I Ch R 169; *Re Brookman's Trust* (1869) 5 Ch App 182; *Jervis v Wolferstan* (1874) LR 18 Eq 18. Cf *Wathen v Smith* (1819) 4 Madd 325.

15 See the Inheritance (Provision for Family and Dependents) Act 1975 ss 11, 12; para 322 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 688.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(iii) Restrictions on Freedom of Testamentary Disposition/320. Effect of particular covenants making family provision.

320. Effect of particular covenants making family provision.

A covenant by a father, for example in a marriage settlement, to leave his property in a specified way among his children does not deprive him of the right of expenditure, but he cannot evade his obligation by disposing of his property during his life, in a manner inconsistent with his contract, by any instrument¹ having the same effect as a testamentary disposition², or by purposely altering the nature of the property³; nor can he cut down the interest which he has covenanted to give⁴.

Similarly, a covenant to leave a child all or an aliquot share⁵ of the parent's property at death does not interfere with the covenantor's power to dispose of the property in his lifetime⁶. If the covenant is to make provision for children or grandchildren by deed or will, the covenantor is not bound to make provision for children who die in his lifetime⁷. Where, however, a father covenanted to leave to his daughter an equal share of his property with his other children, and the daughter predeceased him leaving children who survived him, it was held that the covenant could be performed⁸.

1 Eg an instrument by which he reserved himself an interest for his life.

2 *Jones v Martin* (1798) 5 Ves 266n, HL; *Fortescue v Hennah* (1812) 19 Ves 67; *Logan v Wienholt* (1833) 1 Cl & Fin 611, HL. Cf *Webster v Milford* (1708) 2 Eq Cas Abr 362. See also *Re Bennett, Bennett v Bennett* [1934] WN 177; revsd on the facts (1934) 78 Sol Jo 876, CA.

3 Thus if the covenant affects personal property, the covenantor cannot evade his obligation by turning it into land: *Lewis v Madocks* (1803) 8 Ves 150; *Cochran v Graham* (1811) 19 Ves 63 at 66; *Logan v Wienholt* (1833) 1 Cl & Fin 611, HL. As to the performance of such a covenant by intestacy see EQUITY vol 16(2) (Reissue) PARA 756; and as to election see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

4 *Davies v Davies* (1831) 1 LJ Ch 31. A covenant to settle property subject, and without prejudice, to any dispositions made by the covenantor's will is only a provision against intestacy, and does not prevent him from disposing of the property by will: see *Stocken v Stocken* (1838) 4 My & Cr 95.

5 A covenant to bequeath a fourth part of whatsoever estate the covenantor should die possessed of means a one-fourth share in value and not in specie (*Bell v Clarke* (1858) 25 Beav 437), and a covenant to leave a daughter 'her share' has been held to mean an equal share with the other children in the covenantor's residuary personal estate (*Laver v Fielder* (1862) 32 Beav 1; *Duckett v Gordon* (1860) 11 I Ch R 181), but a covenant to leave a share means only some share and may be satisfied by a legacy (*Re Fickus, Farina v Fickus* [1900] 1 Ch 331). Where the covenant was to leave a daughter an equal share with the covenantor's other five daughters, it

was satisfied by an absolute bequest of a one-sixth share of the covenantor's estate, the shares of the other five daughters being settled on them for life with remainders to their issue and gifts over to the other four in the event of any one dying without issue, and the covenantee was not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter who died without issue: *Clegg v Clegg* (1831) 2 Russ & M 570. See also *Stephens v Stephens* (1886) 19 LR Ir 190 (where advancements to other children were not taken into consideration). A gift of a life interest to one daughter is, however, a portion to that daughter, and a covenantee is entitled to receive an equivalent in value under a covenant to give her an equal portion with her sister: *Eardley v Owen* (1847) 10 Beav 572. As to satisfaction generally see EQUITY vol 16(2) (Reissue) PARA 739 et seq.

6 *Needham v Kirkman* (1820) 3 B & Ald 531; *Needham v Smith* (1828) 4 Russ 318. See also *Cochran v Graham* (1811) 19 Ves 63; *Willis v Black* (1824) 1 Sim & St 525.

7 *Needham v Smith* (1828) 4 Russ 318; *Jones v How* (1850) 7 Hare 267; *Re Brookman's Trust* (1869) 5 Ch App 182.

8 *Barkworth v Young* (1856) 4 Drew 1. As to gifts to a testator's issue who predecease the testator see the Wills Act 1837 s 33 (as substituted); and PARAS 457, 459 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(iii) Restrictions on Freedom of Testamentary Disposition/321. Restrictions under an agreement to make mutual wills.

321. Restrictions under an agreement to make mutual wills.

Mutual wills may be made, either by a joint will or by separate wills, in pursuance of an agreement that they are not to be revoked¹. Such an agreement may appear from the wills², or may be proved outside the wills³, but it must be a legally binding contract⁴; and such a contract is not established by the mere fact that the wills are in identical terms⁵. If no such agreement is shown, each party remains free to revoke his will, if there are separate wills, or to revoke the joint will, so far as it disposes of his property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made, notwithstanding that he has received benefits out of the estate of the deceased party⁶. Even when there is such an agreement and one party has died after departing from it by revoking or altering the will, the survivor having notice of the breach cannot claim to have the other's revocation or alteration of his will set aside, since the notice gives him the chance of altering his own will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose⁷. Even a fairly minor departure by the first to die from the agreed dispositions, without the survivor's knowledge or agreement, will release the survivor from the agreement⁸. If, however, the party who has died has stood by the agreement and not revoked or altered his will, the survivor is bound by it; and although probate will be granted of a later will made by the survivor in breach of the agreement, since a court of probate is only concerned with the last will⁹, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the mutual wills¹⁰. Effect is given to the obligation by a floating, constructive trust which crystallises on the death of the survivor¹¹.

Where mutual wills, whether contained in a joint will or in separate documents, relate to joint property, the agreement to make the mutual wills, and the making of the dispositions in pursuance of the agreement, sever the joint tenancy and convert it into a tenancy in common¹².

1 As to joint wills see PARA 307 ante; and as to mutual wills see PARA 308 ante.

2 *Dufour v Pereira* (1769) 1 Dick 419, as reported sub nom *Durour v Perraro* 2 Hargrave's Juridical Arguments 304; *Re Oldham, Hadwen v Myles* [1925] Ch 75 at 84.

3 *Re Heys, Walker v Gaskill* [1914] P 192 at 194; *Birmingham v Renfrew* (1936) 57 CLR 666, 43 ALR 520, Aust HC; *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939.

4 *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63 at 70-71, [1997] 1 WLR 1216 at 1224-1225, CA, per Leggatt LJ, and at 75 and 1229 per Morritt LJ; *Birch v Curtis* [2002] EWHC 1158 (Ch), [2002] 2 FLR 847, [2002] WTLR 965; *Lewis v Cotton* [2001] WTLR 1117, NZ CA; *Healey v Brown* [2002] All ER (D) 249 (Apr), [2002] WTLR 849 (the wills were expressed to be mutual wills but there was no binding contract because the Law of Property (Miscellaneous Provisions) Act 1989 s 2 was not satisfied (see PARA 319 note 1 ante)). What is required is a mutual intention that both wills should remain unaltered and that the survivor should be bound to leave the combined estates to the agreed ultimate beneficiary: see *Re Goodchild, Goodchild v Goodchild* supra at 71 and 1225-1226 per Leggatt LJ. It is a more stringent requirement than in the case of a secret trust of property inherited from another subject to an agreement as to how it will be disposed of on the donee's death (such as in *Ottaway v Norman* [1972] Ch 698, [1971] 3 All ER 1325; *Healey v Brown* supra), because an agreement to make mutual wills binds the survivor's own property as well as any which he inherits from the other person: *Re Goodchild, Goodchild v Goodchild* supra at 70 and 1224 per Leggatt LJ, and at 75 and 1229 per Morritt LJ. For an agreement to make mutual wills to create a binding obligation on the survivor of the testators, it is not necessary for it to be an agreement under which the will of the first to die confers a benefit on the survivor: see *Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129.

5 *Re Oldham, Hadwen v Myles* [1925] Ch 75 at 87; *Gray v Perpetual Trustee Co Ltd* [1928] AC 391 at 400, PC; *Vine v Joyce* (1963) Times, 24 October; *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939; *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA; *Birch v Curtis* [2002] EWHC 1158 (Ch), [2002] 2 FLR 847; *Lewis v Cotton* [2001] WTLR 1117, NZ CA.

6 See note 5 supra.

7 *Stone v Hoskins* [1905] P 194 at 197.

8 *Re Holey* (1997) Times, 16 June.

9 *Re Heys, Walker v Gaskill* [1914] P 192 at 200.

10 *Dufour v Pereira* (1769) 1 Dick 419, as reported sub nom *Durour v Perraro* 2 Hargrave's Juridical Arguments 304; *Stone v Hoskins* [1905] P 194; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913; *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939. Marriage of the survivor, after the death of the first party to the agreement to make mutual wills to die, will not affect this obligation: *Re Goodchild, Goodchild v Goodchild* [1996] 1 All ER 670, [1996] 1 WLR 694 (the point not being considered on appeal at [1997] 3 All ER 63, [1997] 1 WLR 1216, CA), distinguishing *Re Marsland, Lloyds Bank Ltd v Marsland* [1939] Ch 820, [1939] 3 All ER 148, CA. As to the effects of contracts relating to wills generally see PARAS 318-319 ante. See also *Ebden's Estate v Ebden* [1910] App D 321.

11 *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939. The survivor may spend on himself assets subject to the mutual wills agreement in which (apart from the mutual wills agreement) he has an absolute interest, but he cannot make substantial lifetime or testamentary gifts so as to defeat the mutual wills agreement: see *Re Cleaver, Cleaver v Insley* supra at 1024-1025 and at 946-947 per Nourse J, citing passages from *Birmingham v Renfrew* (1936) 57 CLR 666, 43 ALR 520, Aust HC.

12 *Re Wilford's Estate, Taylor v Taylor* (1879) 11 ChD 267; *Re Heys, Walker v Gaskill* [1914] P 192 at 195; *Szabo v Boros* [2002] WTLR 1389, BC CA. A tenancy in common in land can now exist only in equity: see REAL PROPERTY VOL 39(2) (Reissue) PARA 207.

UPDATE

321 Restrictions under an agreement to make mutual wills

NOTE 4--See also *Olins v Walters* [2008] EWCA Civ 782, [2009] 2 WLR 1, [2008] All ER (D) 58 (Jul).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(1) INTRODUCTION/(iii) Restrictions on Freedom of Testamentary Disposition/322. Restriction by statute and the rule against perpetuities.

322. Restriction by statute and the rule against perpetuities.

Where the court is of opinion¹ that the disposition of the testator's estate is not such as to make reasonable provision for the maintenance of a surviving spouse (including a former spouse who has not remarried), cohabitee, child or dependant of his who applies to the court under the Inheritance (Provision for Family and Dependents) Act 1975¹, the court may order reasonable provision for the maintenance of the applicant to be made out of the testator's net estate². The court may not make such an order if the result would be that a contract for full consideration entered into by the testator as to the disposition of his estate could not be enforced³, but, where an agreement is made on or after 1 April 1976 otherwise than for full consideration and with a view to defeating an application under the Inheritance (Provision for Family and Dependents) Act 1975, the court has power, on an application under that Act, to order that such sum of money or property as may be specified in the order be returned or retained to be made available for the provision of maintenance⁴.

A provision in a will settling property on such trusts that it may vest outside the perpetuity period is, if in the event this proves to be the case, void⁵. A provision which directs accumulation of income⁶ outside the time for accumulation allowed by law is void⁷.

1 As to the restrictions contained in the Inheritance (Provision for Family and Dependents) Act 1975 see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq. The category of cohabitee (ie someone who, during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased) was introduced in relation to persons dying on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 2, amending the Inheritance (Provision for Family and Dependents) Act 1975 s 1. As from a day to be appointed, provision may also be made for civil partners: see s 1 (prospectively amended by the Civil Partnership Act 2004 s 71, Sch 4 Pt 2 para 15). At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq.

3 *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC (not following *Dillon v Public Trustee of New Zealand* [1941] AC 294, [1941] 2 All ER 284, PC).

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 691.

5 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1067 et seq.

6 As to what gifts carry intermediate income see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 499 et seq.

7 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1119 et seq.

UPDATE

322 Restriction by statute and the rule against perpetuities

NOTE 1--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(2) TESTAMENTARY CAPACITY/(i) In general/323. Persons capable of making a valid will.

(2) TESTAMENTARY CAPACITY

(i) In general

323. Persons capable of making a valid will.

A person aged 18 years or over and of sound mind¹ may make a valid will; but, except in specified cases², no will made by a person under the age of 18 years is valid³.

A married woman is under no disability in disposing by will of her property⁴; and there is now no restriction on the testamentary capacity of persons convicted of crimes, and virtually no restriction on the testamentary capacity of aliens as such⁵.

1 As to soundness of mind see PARA 324 post.

2 In the case of a soldier, sailor or airman who is a minor: see PARAS 371-372 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 307.

3 Wills Act 1837 s 7 (amended by the Family Law Reform Act 1969 s 3(1)(a)). As to when a person attains full age see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1. A will is to be construed to speak and take effect as if it had been executed immediately before the death of the testator (see the Wills Act 1837 s 24; and PARA 573 post); but this provision does not enlarge the testator's capacity to make a will; and a will made by a minor does not become valid by reason of his attaining the age of majority before his death. It seems that the Wills Act 1837 s 7 (as amended) does not bind the Sovereign, who in legal contemplation is never a minor: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 2.

4 See the Law Reform (Married Women and Tortfeasors) Act 1935 ss 1, 2(1) (s 1 amended by the Law Reform (Husband and Wife) Act 1962 s 3(2), Schedule).

5 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 306.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(2) TESTAMENTARY CAPACITY/(ii) Mental Disability/324. Soundness of mind, memory and understanding.

(ii) Mental Disability

324. Soundness of mind, memory and understanding.

It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature¹.

1 Shep Touch (8th Edn) 403; *Marquess of Winchester's Case* (1598) 6 Co Rep 32a; *Hastilow v Stobie* (1865) LR 1 P & D 64 at 68. See also *Clancy v Clancy* [2003] EWHC 1885 (Ch), [2003] 37 LS Gaz R 32, [2003] All ER (D) 536 (Jul). See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 308 et seq.

UPDATE

324 Soundness of mind, memory and understanding

NOTE 1--See *Allen v Emery* [2005] EWHC 2389 (Ch), (2005) 8 ITELR 358.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(2) TESTAMENTARY CAPACITY/(ii) Mental Disability/325. Want of knowledge or approval.

325. Want of knowledge or approval.

Although knowledge of the contents of a will and approval of it by the testator are essential to the validity of the will, this is normally assumed in the case of a competent testator from the fact that he has duly executed it¹. However, whenever the circumstances under which the will has been prepared raise a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless that suspicion is removed².

1 *Barry v Butlin* (1838) 2 Moo PCC 480. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 306.

2 *Tyrrell v Painton* [1894] P 151 at 159, CA, per Davey LJ; *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL. See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 316 et seq. For the evidential requirements for proof of knowledge and approval see *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097; *Reynolds v Reynolds* [2005] EWHC 6 (Ch), [2005] All ER (D) 70 (Jan).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(2) TESTAMENTARY CAPACITY/(ii) Mental Disability/326. Undue influence.

326. Undue influence.

In addition to cases of fraud or forgery¹, which both vitiate an impugned clause or entire will according to the circumstances, a will or part of a will may be set aside as having been obtained by undue influence².

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 325-326. As to forgery and fraud generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 323-324. As to undue influence see EQUITY vol 16(2) (Reissue) PARA 417 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(i) English Property disposable by Will/327. Immovables and movables.

(3) PROPERTY CAPABLE OF DISPOSITION

(i) English Property disposable by Will

327. Immovables and movables.

The extent to which a person may dispose by will of property belonging to him¹ depends, in the case of immovables, on the *lex situs*, and, in the case of movables, on the law of the domicile of the testator at his death². In this title it is assumed in both cases that there is no foreign element to consider, and the law of England and Wales only is stated.

- 1 As to the exercise of general and special powers see POWERS vol 36(2) (Reissue) PARA 260 et seq.
- 2 See PARA 311 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 399 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(i) English Property disposable by Will/328. Property passing under a will.

328. Property passing under a will.

A testator of full capacity¹ may dispose by will of all real estate and all personal estate² to which he is entitled, either at law or in equity, at the time of his death, which, if not so disposed of, would have devolved on his executor or administrator³. The freedom of a testator to dispose of his estate to the exclusion of a surviving spouse or former spouse, a cohabitee or a surviving child or dependant of his, is restricted by statute⁴. Moreover, his freedom of testamentary disposition may be restricted by an agreement entered into by him as to the contents of his will⁵.

- 1 As to testamentary capacity see PARA 323 et seq ante.
- 2 For the meaning of 'real estate' see PARA 573 note 3 post; and for the meaning of 'personal estate' see PARA 573 note 4 post. The law as to realty and personalty was assimilated as regards testamentary disposition as from 1 January 1838 by the Wills Act 1837 s 3 (as amended).
- 3 See *ibid* s 3 (amended by the Statute Law Revision (No 2) Act 1888; and the Statute Law (Repeals) Act 1969). The Law of Property Act 1925 s 178 (repealed) provided that the Wills Act 1837 s 3 (as amended) should authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will, notwithstanding that, by reason of illegitimacy or otherwise, he did not leave an heir or next of kin surviving him. As to devolution see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 335 et seq. Before the Wills Act 1837, the will of a testator disposing of all his real estate operated only as a conveyance of specific hereditaments and did not carry land acquired between the date of the will and the date of death (*A-G v Vigor* (1803) 8 Ves 256 at 283), although it might comprise after-acquired interests which before the death had become merged in the interests belonging to the testator at the date of the will (see eg *Bunter v Coke* (1707) 1 Salk 237). Personalty belonging to the testator at the date of his death but not at the date of the will might, however, pass by the will even before the Wills Act 1837: see *Bunter v Coke* *supra*. As to the abolition of the heir-at-law or customary heir see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 584. Realty as well as personalty now passes to the testator's personal representatives: see the Administration of Estates Act 1925 s 1; para 315 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 335 et seq. The Wills Act 1837 takes effect only to enable equitable interests to be disposed of subject and without prejudice to the estate and powers of the personal representatives: Law of Property (Amendment) Act 1924 s 9, Sch 9 para 3.
- 4 See PARA 322 ante. As to the former rule against disinheriting the heir etc except expressly or by necessary implication see PARA 548 post.
- 5 See PARAS 318-320 ante. As to the effect of taking a benefit under a mutual will see PARA 321 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(i) English Property disposable by Will/329. Examples of property which may be disposed of.

329. Examples of property which may be disposed of.

The following are examples of particular kinds of property¹ which may be disposed of by will:

- 19 (1) the legal or equitable estate or interest in freeholds² or in personal property, other than an interest ceasing with the life of the testator³, but including entailed interests in the case of wills executed after 31 December 1925 or confirmed or republished by codicil executed after that date⁴;
- 20 (2) incorporeal hereditaments⁵, including easements⁶, profits à prendre, rentcharges⁷ and advowsons⁸ held for an interest not ceasing on death;
- 21 (3) personal chattels within the meaning of the Administration of Estates Act 1925⁹;
- 22 (4) all contingent, executory or other future interests in any real or personal estate¹⁰, whether the testator may or may not be ascertained as the person or one of the persons in whom the interests respectively may become vested¹¹, and whether he may be entitled to them under the instrument by which they were created or under any disposition of them by deed or will or under an intestacy¹²; in this class are included rights described as possibilities coupled with an interest¹³ and assets comprised in an unadministered residuary estate¹⁴; a 'bare' possibility, such as the expectation of an heir or the next of kin of a living person, is not a title to property in English law¹⁵, but such a possibility may be devised so as to pass on the death of the testator if it has already before his death ripened into an interest by the death of the named person¹⁶;
- 23 (5) rights of entry for conditions broken, and other rights of entry, and rights of reverter¹⁷;
- 24 (6) property given to the testator by the will of a person who survived him, in cases where such gift does not lapse; into this class comes a gift made to the testator and in the case of his death to his personal representative¹⁸; and a devise to the testator of an estate tail by a person who survives the testator, if the testator leaves issue, living at the death of the deviser, who would be inheritable under the entail, unless a contrary intention appears by the deviser's will¹⁹;
- 25 (7) the rent reserved by a lease, which may, it seems, be devised apart from the reversion²⁰;
- 26 (8) certain choses (or things) in action²¹, for example rights of action for damages or other matters which devolve on the personal representative²², copyright for the full extent of the term of the right²³, or a debt or bond²⁴; but a bequest of a debt or bond does not of itself enable a legatee who is not also an executor to sue in his own name and to oust the executor's right to sue²⁵; prima facie, the money payable under a policy of assurance which a person effects on his own life is his own and he can dispose of it by will, but the conditions under which the assurance is effected may provide otherwise²⁶.

A testator may dispose of an interest which arises by way of trust and is merely equitable²⁷, such as his interest in property which he has agreed to purchase²⁸.

1 As to the meaning of 'property' see REAL PROPERTY vol 39(2) (Reissue) PARA 1.

2 At common law, under the feudal system, land or tenements of freehold tenure were not devisable by will except, by custom, in some boroughs and in Kent (Littleton's Tenures s 167; Co Litt 111b; Shep Touch (8th Edn) 399, 420), but until the Statute of Uses (1535) (repealed) the difficulty could be obviated by resort to the doctrine of uses. Express powers to devise freehold land were given by the Statutes of Wills (ie 32 Hen 8 c 1 (1540) and 34 & 35 Hen 8 c 5 (1542) (both repealed)), by virtue of which all land of common socage tenure and two-thirds of land of tenure in chivalry held for an estate of inheritance might be devised. The Tenures Abolition Act 1660 s 4, by converting tenure in chivalry into common socage, extended the power of disposition. Copyholds could be devised, but a surrender made after admittance to the use of the will was required until 1815, when by statute this was made unnecessary (55 Geo 3 c 192 (Disposition of Copyhold Estates by Will) (1815) (repealed and substantially re-enacted by the Wills Act 1837 s 3, the relevant parts of which have been repealed by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt III)). See generally CUSTOM AND USAGE.

3 Thus a life interest under a trust, or an interest as a joint tenant, will not pass by will, but a joint tenancy can be severed (other than by will) so as to change the interest to an undivided share which can be disposed of by will: see PARA 331 post.

4 See the Law of Property Act 1925 s 176; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 372; REAL PROPERTY vol 39(2) (Reissue) PARA 141. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997 (see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119) but the statutory power of disposition of entailed property continues in relation to entails created before that date (see PARA 671 post).

5 See the Wills Act 1837 s 1. See also 34 & 35 Hen 8 c 5 (Wills) (1542) s 4 (repealed). Examples of devisable incorporeal hereditaments are a seignory (Shep Touch (8th Edn) 429) and gales (ie grants of mining rights) in the Forest of Dean (see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 615).

6 As to the transfer of easements by deed or will see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 121.

7 As to rentcharges see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 751 et seq.

8 As to advowsons see ECCLESIASTICAL LAW.

9 See the Administration of Estates Act 1925 s 55(1)(x); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591.

10 As to the creation of these interests generally see PERSONAL PROPERTY vol 35 (Reissue) PARA 1229 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 162 et seq; SETTLEMENTS vol 42 (Reissue) PARA 715 et seq. In the case of real estate these interests can now be only equitable: see REAL PROPERTY vol 39(2) (Reissue) PARA 165.

11 Prior to the Wills Act 1837, a contingent or executory interest could not be devised unless the testator was ascertained as the person in whom the interest must vest: *Doe d Calkin v Tomkinson* (1813) 2 M & S 165 at 170.

12 Wills Act 1837 s 3 (amended by the Statute Law Revision (No 2) Act 1888; and the Statute Law (Repeals) Act 1969).

13 *Selwyn v Selwyn* (1761) 2 Burr 1131 (remainder) (explained in *Jones v Roe* (1789) 3 Term Rep 88 at 94 per Kenyon CJ, and at 96 per Buller JJ); *Moor v Hawkins* (1765) 2 Eden 342 (equitable executory interest); *Roe d Noden v Griffiths* (1766) 1 Wm BI 605 per Dennison J; *Roe d Perry v Jones* (1788) 1 Hy BI 30 (affd sub nom *Jones v Roe* supra); *Scawen v Blunt* (1802) 7 Ves 294 at 300 per Grant MR (not following *Bishop v Fountain* (1695) 3 Lev 427 and 1 Roll Abr 609); *Perry v Phelps* (1810) 17 Ves 173 at 182. Executory interests in terms of years were held to be devisable at an early period: *Cole v Moore* (1607) Moore KB 806; *Veizy v Pinwell* (1641) Poll 44.

14 *Re Leigh's Will Trusts, Handyside v Durbridge* [1970] Ch 277, [1969] 3 All ER 432.

15 *Jones v Roe* (1789) 3 Term Rep 88 at 93. See CHUSES IN ACTION vol 13 (2009) PARA 30; REAL PROPERTY vol 39(2) (Reissue) PARA 183.

16 See the Wills Act 1837 s 3 (amended by the Statute Law Revision (No 2) Act 1888; and the Statute Law (Repeals) Act 1969). See also *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51; followed in *Re Earl Middleton's Will Trusts, Whitehead v Earl of Middleton* [1969] 1 Ch 600, [1967] 2 All ER 834 (not following *Re Duke of St Albans' Will Trusts, Coutts & Co v Beauclerk* [1963] Ch 365, [1962] 2 All ER 402). Cf *Izard v Tamahau Mahupuku* (1902) 22 NZLR 418. See also head (6) in the text.

17 Wills Act 1837 s 3 (as amended: see note 16 supra). A right of re-entry may arise where an estate in fee simple is limited upon condition. Formerly the benefit of such a right was not devisable and could be exercised only by the grantor or his heir-at-law (*Avelyn v Ward* (1750) 1 Ves Sen 420 at 422-423), but now it may be made exercisable by any person and the persons deriving title under him (see the Law of Property Act 1925 s 4(3); and REAL PROPERTY vol 39(2) (Reissue) PARA 98). The interest of the grantor and his successors in title is a possibility of reverter, and is within the express words of the Wills Act 1837 s 3 (as amended): *Pemberton v Barnes* [1899] 1 Ch 544 at 549. A right of re-entry may also arise in the case of a determinable fee, and here also it exists as a possibility of reverter (see REAL PROPERTY vol 39(2) (Reissue) PARAS 114-116, 162), and appears to be within the words 'other rights of entry' (see Challis's Law of Real Property (3rd Edn) p 228). A right of reverter under the School Sites Act 1841 can be given by will under the Wills Act 1837 s 3 (as amended): *Bath and Wells Diocesan Finance Board v Jenkinson* [2002] EWHC 218 (Ch), [2003] Ch 89, [2002] 4 All ER 245.

18 *Long v Watkinson* (1852) 17 Beav 471. Where property is given to the testator or to his personal representatives, then, although it is directed to 'form part of his estate', a person specified by the testator must, in order to take any benefit, survive the donor, for such person takes as direct beneficiary of the donor, and, if

the testator's universal legatee predeceases the donor, there will be a lapse of the gift: see *Re Greenwood*, *Greenwood v Sutcliffe* [1912] 1 Ch 392 at 397; *Re Cousen's Will Trusts*, *Wright v Killick* [1937] Ch 381, [1937] 2 All ER 276; *Re Wray*, *Wray v Wray* [1951] Ch 425 at 428, [1951] 1 All ER 375 at 428, CA, per Sir Raymond Evershed MR. See further PARA 455 post.

Lapse was also prevented where a gift was made to the testator by will by an ancestor who survived him but died before 1 January 1983, if the testator left issue living at the death of the ancestor, unless a contrary intention appeared by the ancestor's will: see the Wills Act 1837 s 33 (as originally enacted); and PARA 457 post. This provision has been replaced in relation to persons dying on or after 1 January 1983: see the Administration of Justice Act 1982 ss 19, 73(6), 76(11); and PARA 459 post. As to the former position see *Johnson v Johnson* (1843) 3 Hare 157; *Winter v Winter* (1846) 5 Hare 306; *Re Scott* [1901] 1 KB 228, CA; and PARA 457 post.

19 Wills Act 1837 s 32 (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). The repeal of the Wills Act 1837 s 32 does not, however, affect any entailed interests created before 1 January 1997: Trusts of Land and Appointment of Trustees Act 1996 s 25(4). Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see s 2, Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. See also PARA 456 post.

20 *Ards v Watkin* (1598) Cro Eliz 637, 651. Cf para 659 post.

21 As to choses (or things) in action which are not disposable see PARA 334 post.

22 Shep Touch (8th Edn) 431 (actions for goods or for an account); *Drew v Merry* (1701) 1 Eq Cas Abr 175 pl 7 (right to set aside a release). As to causes of action which survive for the benefit of the estate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814 et seq. As to the benefit of restrictive covenants relating to user of land see EQUITY vol 16(2) (Reissue) PARA 613 et seq; SALE OF LAND vol 42 (Reissue) PARA 331 et seq.

23 See the Copyright, Designs and Patents Act 1988 s 90(1); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 158, 172. A gift of copyright may be partial, that is, limited so as to apply to one or more, but not all, of the things which the copyright owner has the exclusive right to do, or to part, but not the whole, of the period for which the copyright is to subsist: see s 90(2); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 161. Where under a bequest (whether specific or general) a person is entitled, beneficially or otherwise, to: (1) an original document or other material thing recording or embodying a literary, dramatic, musical or artistic work which was not published before the death of the testator; or (2) an original material thing containing a sound recording or film which was not published before the death of the testator, the bequest is, unless a contrary intention is indicated in the testator's will or a codicil to it, to be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his death: see s 93; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 172. The following intellectual property rights are also transmissible by testamentary disposition: (a) database right (see the Copyright and Rights in Databases Regulations 1997, SI 1997/3032, reg 23; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 745); (b) moral rights (see the Copyright, Designs and Patents Act 1988 s 95; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 484); (c) a performer's property and non-property rights (see ss 191B, 192A (both as added); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 641, 648); (d) design right (see s 222; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 522); (e) patents (see the Patents Act 1977 s 30 (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 373); (f) publication right (see the Copyright and Related Rights Regulations 1996, SI 1996/2967, reg 17(1); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 500); and trade marks (see the Trade Marks Act 1994 s 24; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 129).

24 *Anon* (1714) 1 P Wms 267; Shep Touch (8th Edn) 430.

25 *Bishop v Curtis* (1852) 18 QB 878; *Robertson v Quiddington* (1860) 28 Beav 529 (bequest of share of testator's interest in goodwill of a partnership). See also PARTNERSHIP vol 79 (2008) PARA 172. The will may make the legatee a special executor with regard to the debt so as to be able to sue in his own name; and, in any event, the legatee may compel the executor to sue: Shep Touch (8th Edn) 430. In the case of negotiable instruments payable to the testator's order, the executors, subject to administration of the estate, are bound to indorse them, or to allow one of their number to indorse them, and to deliver them to the legatee in order to enable him to sue: *Re Robson*, *Robson v Hamilton* [1891] 2 Ch 559 at 563-564. Mere delivery by the executors after indorsement by the testator himself is not generally sufficient: *Bromage v Lloyd* (1847) 1 Exch 32. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1442. As to the costs of recovering a specifically bequeathed debt see *Re De Sommers*, *Coelenbier v De Sommers* [1912] 2 Ch 622 at 628, discussing *Perry v Meddowcroft* (1841) 4 Beav 197; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 483.

26 *Re Phillips' Insurance* (1883) 23 ChD 235 at 247, CA, per Lindley LJ. See further INSURANCE vol 25 (2003 Reissue) PARAS 556-560.

27 *Car v Ellison* (1744) 3 Atk 73 (equitable interest in copyhold, under devise of real estate); *Perry v Phelps* (1790) 1 Ves 251 at 254; *Marquis of Cholmondeley v Lord Clinton* (1821) 4 Bli 1 at 80, HL. As to gifts of assets

comprised in the unadministered residuary estate of a deceased person see *Re Leigh's Will Trusts, Handyside v Durbridge* [1970] Ch 277, [1969] 3 All ER 432.

28 *Davie v Beardsham* (1663) 1 Cas in Ch 39; *Greenhill v Greenhill* (1711) 2 Vern 679; *Gibson v Lord Montford* (1750) 1 Ves Sen 485; *Perry v Phelps* (1790) 1 Ves 251 at 254; *Morgan v Holford* (1852) 1 Sm & G 101. As to the rights of the devisees of land subject to contract to purchase by the testator see *Whittaker v Whittaker* (1792) 4 Bro CC 31; *Broome v Monck* (1805) 10 Ves 597 at 605; *Re Cockcroft, Broadbent v Groves* (1883) 24 ChD 94; *Re Kidd, Brooman v Withall* [1894] 3 Ch 558; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 1166.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(i) English Property disposable by Will/330. State of testator's title.

330. State of testator's title.

The title of the testator need not be a good title¹. A devise or bequest of a mere possessory interest is valid², subject to the paramount rights of the persons dispossessed³. A testator who has sold property in circumstances entitling him to have the sale set aside has a devisable interest⁴. If a trustee specifically devises property which he has purchased from himself and the purchase is set aside, the specific devisee, not the residuary legatee, is entitled to the repaid purchase money⁵.

1 As to estoppel of a beneficiary taking possession of any property under the terms of the will generally see ESTOPPEL vol 16(2) (Reissue) PARA 1041.

2 *Asher v Whitlock* (1865) LR 1 QB 1; *Clarke v Clarke* (1868) IR 2 CL 395; *Calder v Alexander* (1900) 16 TLR 294.

3 *Shep Touch* (8th Edn) 428.

4 *Gresley v Mousley* (1859) 4 De G & J 78 at 89, 92 (following *Uppington v Bullen* (1842) 2 Dr & War 184; and *Stump v Gaby* (1852) 2 De GM & G 623 at 630); *Turner v Turner, Hall v Turner* (1880) 14 ChD 829.

5 *Re Sherman, Re Walters, Trevenen v Pearce* [1954] Ch 653, [1954] 1 All ER 893.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(i) English Property disposable by Will/331. Co-owners.

331. Co-owners.

By will, tenants in common may dispose of their shares in equity of the property held in common¹. As regards joint tenants, a gift by the will of one of them of his share in the property does not sever the joint tenancy², and does not affect the contingent paramount title of the other joint tenant to take by survivorship³, but a gift of his interest in the property made by the will of one joint tenant during the joint tenancy may, in the event of the testator becoming before his death the surviving owner, be effectual to pass the property⁴.

1 A tenancy in common of land cannot now exist at law but only in equity. Between 1 January 1926 and 31 December 1996 inclusive a tenancy in common of land could only exist behind a trust for sale, ie the owner of the undivided share had no estate in the land itself, but he had an interest in the proceeds of sale of the land and in the income of the land until sale: see REAL PROPERTY vol 39(2) (Reissue) PARAS 64, 207 et seq. On and after 1 January 1997 all trusts for sale formerly imposed by statute have become trusts of land (without a duty to

sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share will now have an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66. Where trusts for sale are imposed expressly by the trust instrument, then, unless the trust was created by the will of a testator who died before 1 January 1997, the existence of the duty to sell no longer means that the land is to be regarded as personal property: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq.

2 2 Bl Com (14th Edn) 186; Bac Abr, Joint Tenants (I) 3; Shep Touch (8th Edn) 414, 431. See also REAL PROPERTY vol 39(2) (Reissue) PARA 204. As to an agreement by a joint tenant to devise his share see PARA 321 text and note 12 ante. As to joint owners generally see PERSONAL PROPERTY vol 35 (Reissue) PARA 1243 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 189 et seq.

3 Littleton's Tenures s 287; Doctor and Student by Saint-German (18th Edn) 185; *Butler and Baker's Case* (1591) 3 Co Rep 25a at 30b, Ex Ch; *Lannoy v Lannoy* (1725) Cas temp King 48; *Turner v A-G* (1876) IR 10 Eq 386 at 392. The share would not, in default of disposition, devolve on the executor within the meaning of the Wills Act 1837 s 3 (as amended): see PARA 329 ante. Questions may arise, however, whether the surviving joint tenant is bound under the doctrine of election: *Dummer v Pitcher* (1831) 5 Sim 35 (affd (1833) 2 My & K 262); *Coates v Stevens* (1834) 1 Y & C Ex 66; *Grosvenor v Durston* (1858) 25 Beav 97; and see EQUITY vol 16(2) (Reissue) PARA 730. As to the doctrine of election see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

4 See the Wills Act 1837 ss 3, 24 (s 3 amended by the Statute Law Revision (No 2) Act 1888; and the Statute Law (Repeals) Act 1969). Before the Wills Act 1837, a will of a joint tenant of real property, made during the joint tenancy, did not operate even to pass his share to which he became entitled in severalty on a subsequent partition, unless the will was republished: *Swift d Neale v Roberts* (1746) 3 Burr 1488, explaining Perkins, Laws of England s 500. The law concerning personal property before the Wills Act 1837 was, however, similar to that stated in the text: see Shep Touch (8th Edn) 430. As to the construction of a will in this respect see PARA 573 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(ii) Things not disposable by Will/332. Property not belonging to the testator.

(ii) Things not disposable by Will

332. Property not belonging to the testator.

Apart from the execution by will of a power¹, a testator cannot effectually dispose by will of property which is not his own², or which he holds in a representative or official capacity³, for example heirlooms, which are such by custom⁴, or property bound by the covenant of the testator to devolve in some other manner⁵. Trust or mortgage estates devolve, notwithstanding any testamentary disposition, on the personal representative of the deceased⁶. Where a contract (such as a life insurance policy) has been entered into by the testator whereby the other party to the contract has agreed to confer a benefit on someone who is not a party to the contract (without any trust for the non-party being created), the testator does not have any interest or right of more than nominal value under the contract which he can dispose of by will⁷.

1 See POWERS vol 36(2) (Reissue) PARA 297 et seq.

2 Such a disposition may, however, raise a question of election: see EQUITY vol 16(2) (Reissue) PARA 724.

3 See Shep Touch (8th Edn) 431-432, giving as examples the masters and governors of colleges and hospitals in respect of the property of those institutions; mayors or other heads of corporations in respect of corporate property; and churchwardens in respect of church property. 'No man can devise anything but what he has to his own use': *Bransby v Grantham* (1577) 2 Plowd 525 at 526; *Lord Hastings v Douglas* (1634) Cro Car 343 at 345.

4 Co Litt 18b (Crown jewels), 185b; *Pusey v Pusey* (1684) 1 Vern 273. As to heirlooms see REAL PROPERTY vol 39(2) (Reissue) PARA 89.

5 *Page v Cox* (1852) 10 Hare 163 (covenant in partnership agreement). As to the effect of covenants to leave property by will see PARA 318 et seq ante.

6 See the Administration of Estates Act 1925 ss 1(1), 3(1)(ii) (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 368-371.

7 Where such a contract was made before 11 November 1999 only the executor could enforce it: *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. Where such a contract was made on or after 11 November 1999 it may also be enforceable by the non-party (although this is only so in relation to contracts made within the period of six months after 11 November 1999 if the contract expressly provides for the application of the Contracts (Rights of Third Parties) Act 1999): see ss 1, 10; and CONTRACT. See also EQUITY vol 16(2) (Reissue) PARA 609.

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333. Testator's body.

No person can make a binding disposition of his own dead body, so as to oust the executors' right to the custody and possession of it and their duties relating to disposal of it¹. However, by statute, a direction for the anatomical examination of a person's body after death and the removal of parts of it for medical purposes may in certain cases be effective².

1 *Williams v Williams* (1882) 20 ChD 659. As to the executors' rights and duties see CREMATION AND BURIAL vol 10 (Reissue) PARA 903; and as to burial expenses see CREMATION AND BURIAL vol 10 (Reissue) PARA 935 et seq.

2 See the Human Tissue Act 1961 s 1(1); and the Anatomy Act 1984. As from a day to be appointed, these provisions are repealed and replaced by the Human Tissue Act 2004 ss 1, 57, 59, Sch 7 Pt 1. At the date at which this volume states the law, no such day had been appointed. See further MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 225 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(3) PROPERTY CAPABLE OF DISPOSITION/(ii) Things not disposable by Will/334. Choses (or things) in action which are not disposable.

334. Choses (or things) in action which are not disposable.

Those rights of action which do not on death devolve on the personal representative, or which come to an end with the life of the owner, cannot be disposed of by will¹.

The powers of nomination conferred by the rules of a friendly or other society over the sums payable on death of a member operate as powers of appointment and may give the member no right of property in the sum assured², but such a power is testamentary and subject, for example, to the doctrine of lapse³. By the terms of a policy of assurance the money payable under it may not be subject to the right of disposition by the assured's will⁴. Such a limitation of a testator's power of disposition by will is valid not only against persons claiming under the will⁵, but also against creditors⁶.

Similarly, although shares held by the testator in a company regulated by the Companies Act 1985 vest on his death in his personal representative⁷, he may have no right, or only a

restricted right, to dispose of them, for other shareholders may have the right to buy them from the personal representatives⁸.

A covenant against assignment in a lease is not in general construed so as to forbid a disposition of the term by the will of the tenant⁹.

1 As to such rights see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814 et seq. As to assignment of rights and liabilities under contract see CONTRACT vol 9(1) (Reissue) PARAS 757-758; and as to assignment of rights and liabilities in respect of torts see TORT vol 45(2) (Reissue) PARA 342. See generally CHOSSES IN ACTION vol 13 (2009) PARA 14 et seq.

2 See *A-G v Rowse* (1844) 36 ChD 67n; *Re Phillips' Insurance* (1883) 23 ChD 235, CA; *Urquhart v Butterfield* (1887) 37 ChD 357, CA. As to payments under a nomination see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2230 et seq; FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2503 et seq; EMPLOYMENT vol 40 (2009) PARA 879.

3 *Re Barnes, Ashenden v Heath* [1940] Ch 267. As to the doctrine of lapse see PARA 450 et seq post.

4 See PARA 329 head 8 ante.

5 *Re Davies, Davies v Davies* [1892] 3 Ch 63 at 69 per North J. See also *Page v Cox* (1852) 10 Hare 163; *Ashby v Costin* (1888) 21 QBD 401, DC; *Phillips v Cayley* (1889) 43 ChD 222, CA. The nomination in such a case is not revocable by will: *Bennett v Slater* [1899] 1 QB 45, CA.

6 *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA.

7 *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167.

8 *Re White, Theobald v White* [1913] 1 Ch 231. As to restrictions on transfer of shares in a company see COMPANIES vol 14 (2009) PARA 434.

9 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 483.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(i) Capacity to Benefit/335. Capacity to benefit in general.

(4) DONEES

(i) Capacity to Benefit

335. Capacity to benefit in general.

As a general rule, any person who may be a grantee under a gift inter vivos may be a donee under a will¹.

A testator must dispose of his property among persons or bodies who, whether or not in existence at the date of the will or of the death, are ascertainable within the period allowed by the rules against remoteness; the principle is that, apart from charitable gifts, there must normally be a donee capable of enforcing the gift or trust in the will². Gifts for non-charitable purposes which are not for the benefit of ascertainable beneficiaries are in general invalid, and purposeless directions are void³. In general, a gift by will cannot be made to a person who is dead at the date of the will⁴. Even if the donee was alive at the date of the will, the gift generally fails if he is dead at the death of the testator, and his personal representatives take no interest under the gift⁵. A gift may, however, be made to the personal representatives of a deceased person⁶. Formerly, by statute, property given to a donee who predeceased the testator in certain cases passed as if the donee had survived the testator⁷, and there remain cases where property given to a donee who predeceases the testator passes to the donee's

issue⁸. The burden of proving that the donee was alive at the death of the testator so as to be capable of taking benefit under the will is on those deriving title under the donee⁹.

The donee must always be described with certainty or be capable of being ascertained on evidence which is admissible¹⁰. He must also be capable of benefiting under the particular will¹¹, but inability to give a receipt for what is given is different from disqualification from taking¹². The unmeritorious character of a donee, as distinct from some invalidity in the intention of the testator, gives rise to neither incapacity nor disqualification¹³.

1 Shep Touch (8th Edn) 414. As to competency to take a gift inter vivos see GIFTS vol 52 (2009) PARA 218. See also *Re Smith, Johnson v Bright-Smith* [1914] 1 Ch 937 at 948 per Joyce J ('... excluding cases of charitable bequests, a legatee must be either a natural person or a corporation'). Where, on or after 1 January 1997, a testator dies having made a gift of a legal estate by will to a minor, the gift operates as a declaration that the estate is to be held on trust for the minor until he attains the age of 18: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 paras 1, 2; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 31.

2 *Bowman v Secular Society Ltd* [1917] AC 406, HL; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067. See also TRUSTS vol 48 (2007 Reissue) PARA 607.

3 As to the necessity for certainty of objects of a trust see generally *Morice v Bishop of Durham* (1805) 10 Ves 522; *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; and TRUSTS vol 48 (2007 Reissue) PARAS 607-608. A direction to shut up a house for 20 years, and subject to that to a devisee in fee, is void so far as the 20-year term is concerned if during that period the house devolves on an intestacy: *Brown v Burdett* (1882) 21 ChD 667. See also *Brown v Burdett* (1888) 40 ChD 244 at 256, CA, per Kay J. Gifts to non-existent persons, including corporations, by name or description are void for want of proper objects: 1 Preston's Abstracts of Title 128; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 122. A gift to the trustees of a settlement on its trusts failed because the settlement was no longer subsisting and there were no longer trustees to receive the property: *Re Slade, Witham v Watson* (1919) 89 LJ Ch 412, HL. Cf *Re Shelton's Settled Estates, Shelton v Shelton* [1945] Ch 158, [1945] 1 All ER 283; *Re Playfair, Palmer v Playfair* [1951] Ch 4, [1950] 2 All ER 285. Gifts to trustees for the benefit of animals or the maintenance of inanimate objects are in some cases valid: see CHARITIES vol 8 (2010) PARA 44; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005; TRUSTS vol 48 (2007 Reissue) PARA 607. As to gifts to non-charitable societies see PARA 338 post. A fiduciary dispositive power may be conferred on trustees or executors, which must satisfy the requirements of certainty under the general law for powers, but those requirements are now such that it is possible to confer extremely wide powers: see PARA 309 ante; and POWERS vol 36(2) (Reissue) PARA 215; TRUSTS vol 48 (2007 Reissue) PARA 655.

4 *Kelsey v Ellis* (1878) 38 LT 471 at 473.

5 As to lapse see PARA 450 et seq post.

6 See PARA 455 post.

7 Ie under the Wills Act 1837 s 32 (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, with effect from 1 January 1997) (see PARA 456 post) and the Wills Act 1837 s 33 (repealed and replaced in relation to testators dying on or after 1 January 1983 by the Administration of Justice Act 1982 s 19) (see PARA 457 post).

8 Ie under the Wills Act 1837 s 33 (repealed and replaced in relation to testators dying on or after 1 January 1983 by the Administration of Justice Act 1982 s 19) (see PARA 459 post).

9 *Wing v Angrave* (1860) 8 HL Cas 183; *Re Phené's Trusts* (1870) 5 Ch App 139, CA; *Re Lewes' Trusts* (1871) 6 Ch App 356; *Re Walker* (1871) 7 Ch App 120; *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723; *Re Aldersey, Gibson v Hall* [1905] 2 Ch 181. See also *Mason v Mason* (1816) 1 Mer 308. The difficulty which arose in *Wing v Angrave* supra with regard to survivorship as between two persons dying on the same occasion is now met (subject to any order of the court) by the presumption that death occurred in order of seniority and accordingly the younger is deemed to have survived the elder: Law of Property Act 1925 s 184. For the settled construction of the statutory presumption see *Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215, HL. See also *Re Lindop, Lee-Barber v Reynolds* [1942] Ch 377, [1942] 2 All ER 46; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 146. As to the construction of expressions such as 'simultaneous death' when used in wills see PARA 537 post. As to the presumption of the fact of death from absence without being heard of for seven years see CIVIL PROCEDURE vol 11 (2009) PARA 1100. See also *Re Rawson, Rigby v Rawson* (1920) 90 LJ Ch 304 (direction for presuming death of missing legatee). In the absence of evidence of the continuance of life, the court will direct a share to be dealt with on the footing that the person to whom the share is given died at the date he was last heard of: *Re Benjamin, Neville v Benjamin* supra; *Re Newson-Smith's Settlement, Grice v Newson-Smith* [1962] 3 All ER 963n, [1962] 1 WLR 1478; *Re Green, Fitzgerald-Hart v A-G* [1985] 3 All ER 455.

10 See PARA 347 post.

11 See PARA 336 post.

12 See PARA 339 post.

13 *Thellusson v Woodford, Woodford v Thellusson* (1799) 4 Ves 227 at 312, 329 (a will is not affected on account of the unmeritorious object in the view of the testator); affd (1805) 11 Ves 112 at 145, HL (regret that such a will should be maintained goes no further than as a motive to see whether it is an attempt to make an illegal disposition).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(i) Capacity to Benefit/336. Persons incapable of taking.

336. Persons incapable of taking.

A testator cannot make a valid disposition of property by will to any person for any purpose forbidden by statute or contrary to public policy¹.

Formerly, at common law, an alien could not take a devise of land, but this disability has been removed by statute². Disability to receive a gift arising from the principles or custom or positive law of a foreign country, especially of a penal nature, is not regarded by the English court³.

The fact that the donee is a member of a religious order or belongs to any society under vows as to the property of its members does not affect his right to take a benefit⁴.

1 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 241-242 per Lord St Leonards. Cf *Re Wallace, Champion v Wallace* [1920] 2 Ch 274, CA. On and after 1 January 1970 gifts to future illegitimate children have been valid: see PARAS 643-644 post. For examples of gifts against public policy see CHARITIES vol 8 (2010) PARA 66. As to public policy in relation to conditions see PARA 422 et seq post; and as to disqualification for benefiting see PARAS 340-341 post.

2 See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13.

3 *Worms v De Valdor* (1880) 49 LJ Ch 261; followed in *Re Selot's Trust* [1902] 1 Ch 488 (both cases as to the appointment of a conseil judiciaire of a French prodigue, where, however, the foreign law did not vest the property of the prodigue in the conseil judiciaire). See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 31. See also *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541, [1961] 3 All ER 803, CA.

4 *Re Metcalfe's Trusts* (1864) 10 LT 78; *Galwey v Barden* [1899] 1 IR 508. The disability of individual Roman Catholics to take gifts was removed by the Roman Catholic Relief Act 1829 s 23 (repealed): see ECCLESIASTICAL LAW. A condition disqualifying a legatee if a Roman Catholic may, however, still be imposed: *Re May, Eggar v May* [1917] 2 Ch 126; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL. As to the removal of the restrictions on gifts to superstitious uses see CHARITIES vol 8 (2010) PARA 63.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(i) Capacity to Benefit/337. Gifts to corporate bodies.

337. Gifts to corporate bodies.

Corporate bodies¹ may be the subject of testamentary bounty in the same way as individuals². If, however, on the true construction of the gift, it is made to the corporate body not beneficially but on trust, the trust and hence the gift may be invalid³.

A company regulated by the Companies Act 1985 can register itself as the holder of its own shares bequeathed to it if the shares are fully paid⁴.

1 As to corporations generally see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1101 et seq. The position of quasi corporations (see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1101-1102) depends in every case on the relevant legislation affecting them: see *Re Amos, Carrier v Price* [1891] 3 Ch 159. As to the position of trade unions see EMPLOYMENT vol 40 (2009) PARA 846 et seq.

2 *Re Smith, Johnson v Bright-Smith* [1914] 1 Ch 937 at 948 per Joyce J. A testamentary gift to an incorporated body, including a company with charitable objects, prima facie takes effect as a gift to that body beneficially as part of its general funds and without imposition of any trust: *Re Finger's Will Trusts, Turner v Ministry of Health* [1972] Ch 286, [1971] 3 All ER 1050; *Re Vernon's Will Trusts, Lloyds Bank Ltd v Group 20, Hospital Management Committee (Coventry)* [1972] Ch 300n, [1971] 3 All ER 1061n.

3 It might be invalid because of uncertainty of objects or lack of identifiable beneficiaries who can enforce the trust. As to the validation of certain trusts contained in instruments taking effect before 16 December 1952 which would otherwise have failed because the trust property was not exclusively applicable to charitable purposes see CHARITIES vol 8 (2010) PARAS 97-102. A gift to a parish council 'for the purpose of providing some useful memorial to myself' was held not to be a beneficial gift, as the words quoted were not merely expository, but were intended to impose an obligation in the nature of a trust, the gift accordingly being void: *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA.

4 A company limited by shares may acquire any of its own fully paid shares otherwise than for valuable consideration: Companies Act 1985 s 143(3); and COMPANIES vol 14 (2009) PARA 333. Before 22 December 1980, when the predecessor of this provision came into force (see the Companies Act 1980 s 35(2); and the Companies Act 1980 (Commencement No 2) Order 1980, SI 1980/1785), a company could not hold in its own name shares in itself which were bequeathed to it, but had to have them vested in a nominee for it: *Re Castiglione's Will Trusts, Hunter v Mackenzie* [1958] Ch 549, [1958] 1 All ER 480. See also COMPANIES vol 14 (2009) PARA 333.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(i) Capacity to Benefit/338. Gifts to non-charitable societies or for non-charitable purposes.

338. Gifts to non-charitable societies or for non-charitable purposes.

A gift to a non-charitable unincorporated association may be intended to take effect in one or other of three different ways¹.

First, it may be a gift to the members of the association at the relevant date as joint tenants², so that any member can sever his share and claim it, whether he continues to be a member of the association or not. Such a gift is clearly valid³.

Secondly, it may be a gift to the existing members, not as joint tenants but subject to their respective contractual rights and liabilities towards one another as members of the association. If this is the effect of the gift, it will not be open to objection on the ground of perpetuity or uncertainty⁴ unless there is something in its terms or circumstances or in the rules of the association which precludes the members at any given time from dividing the subject matter of the gift between them on the footing that they are solely entitled to it in equity⁵. It is a necessary characteristic of any gift within this category that the members of the association can, by an appropriate majority if the rules so provide, or acting unanimously if not, alter their rules so as to provide that the funds should be applied for some new purpose or even distributed among the members for their own benefit, notwithstanding that the testator has obviously contemplated that the money would be applied in furthering the aims, or a particular purpose, of the society in perpetuity⁶.

Thirdly, the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held on trust or applied for the purposes of the association as a quasi corporate entity. In this

case the gift will fail⁷, but the common phrase 'for the purposes of the association' does not by itself import such a trust⁸.

If the gift is expressed as a trust for a non-charitable purpose⁹, it may fail on the grounds of uncertainty or for lack of beneficiaries capable of enforcing it¹⁰. If, however, the trust, although so expressed, is directly or indirectly for the benefit of an ascertained individual or individuals, it is not open to objection merely on the last of these grounds¹¹.

1 See *Neville Estates Ltd v Madden* [1962] Ch 832 at 849, [1961] 3 All ER 769 at 778-779 per Cross J. It may, however, be open to doubt whether there should be any distinction between the first and second of the class of cases mentioned, the second class being only a gift to the members by their collective name: see *Leahy v A-G for New South Wales* [1959] AC 457 at 483-484, [1959] 2 All ER 300 at 310, PC, quoting and approving Lord Hanworth MR in *Re Macaulay's Estate, Macaulay v O'Donnell* [1943] Ch 435n, HL. As to gifts to charitable societies see *Re Finger's Will Trusts, Turner v Ministry of Health* [1972] Ch 286, [1971] 3 All ER 1050; *Re Vernon's Will Trusts, Lloyds Bank Ltd v Group 20, Hospital Management Committee (Coventry)* [1972] Ch 300n, [1971] 3 All ER 1061n.

2 In *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526 at 540, [1971] 3 All ER 401 at 408, Brightman J envisaged that the gift might possibly be to the members as tenants in common, but it is difficult to see how words of severance could be introduced into such a gift.

3 *Bowman v Secular Society Ltd* [1917] AC 406 at 442, HL, per Lord Parker; *Re Smith, Johnson v Bright-Smith* [1914] 1 Ch 937; *Re Ogden, Brydon v Samuel* [1933] Ch 678. The number of the members so benefited may be material in deciding whether this is the true construction of the gift: *Hogan v Byrne* (1862) 13 ICLR 166.

4 *Cocks v Manners* (1871) LR 12 Eq 574; *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110; *Re Prevost, Lloyds Bank Ltd v Barclays Bank Ltd* [1930] 2 Ch 383; *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v Barry* [1936] Ch 520, [1936] 2 All ER 93; *Re Taylor, Midland Bank Executor and Trustee Co Ltd v Smith* [1940] Ch 481, [1940] 2 All ER 637; *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401 (where, however, the gift could not be supported as the society had ceased to exist before the date of the will and the gift could not be construed as a gift to the members of a different association subject to a different contract); *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33. As to the validity of gifts where the recipients can deal freely with the subject matter see CHARITIES vol 8 (2010) PARAS 60, 62; NATIONAL CULTURAL HERITAGE vol 77 (2010) PARAS 945-946; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005.

5 See eg *Re Clark's Trust* (1875) 1 ChD 497 (where, as the gift was a gift of the income of a fund in aid of the funds of a society, and the members at any time could not dispose of the capital, the gift failed).

6 *Langham v Peterson* (1903) 87 LT 744 (revenue of a sum of money to be expended 'for the benefit or hospitality of the company'); *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110 (to the committee of the Corps of Commissionaires 'to aid in the purchase of their barracks'); *Re Turkington, Owen v Benson* [1937] 4 All ER 501 (to a masonic lodge 'as a fund to build a suitable temple'); *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33 (to be used 'solely' in constructing and improving new buildings for an association).

7 *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC. See also *Carne v Long* (1860) 2 De GF & J 75; *Re Dutton, ex p Peake* (1878) 4 ExD 54; *Re Amos, Carrier v Price* [1891] 3 Ch 159; *Re Grant's Will Trusts* [1979] 3 All ER 359, [1980] 1 WLR 360 (doubting *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90; *Re Price, Midland Bank Executor and Trustee Co Ltd v Harwood* [1943] Ch 422, [1943] 2 All ER 505).

8 See *Leahy v A-G for New South Wales* [1959] AC 457 at 478, [1959] 2 All ER 300 at 307, PC.

9 As to the validation of certain trusts contained in instruments taking effect before 16 December 1952 which would otherwise have failed because the trust property was not exclusively applicable to charitable purposes see CHARITIES vol 8 (2010) PARAS 97-102.

10 See TRUSTS vol 48 (2007 Reissue) PARA 607.

11 *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373 at 383, [1968] 3 All ER 65 at 69 per Goff J; approved in *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235 at 248, [1977] 1 All ER 33 at 44 per Oliver J.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(i) Capacity to Benefit/339. Giving of receipts.

339. Giving of receipts.

Although a minor is capable of being a donee under a will, he cannot give the personal representatives a valid receipt for the gift except where he is expressly or impliedly authorised to do so by the testator¹ or, in respect of income, when he is married². However, a parent or guardian of a minor who has parental responsibility³ for the minor has the right to receive or recover in his own name, for the benefit of the minor, any property which the minor is entitled to receive or recover⁴. A person suffering from mental disorder may be a donee⁵, but, while so suffering, cannot give the personal representatives a valid receipt⁶. In the case of a gift to a charity or a non-charitable society⁷ it is prudent to provide that the receipt of the treasurer or other proper officer is to be sufficient discharge to the executors⁸.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 608. An authority to give a receipt will be implied from a gift to be paid to a legatee on his attaining some age less than 18 (see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1), or on marriage (*Cooper v Thornton* (1790) 3 Bro CC 96 at 97 note (2) (affd 3 Bro CC 186); *Re Denekin, Peters v Tanchereau* (1895) 72 LT 220; *Re Somech, Westminster Bank Ltd v Phillips* [1957] Ch 165, [1956] 3 All ER 523). In such a case a trustee has a discretion whether or not to transfer capital, and so the court, if discretion is surrendered to it, has inherent jurisdiction with regard to the minor's property enabling it to inquire whether the proposed transaction is for the minor's benefit or would be improvident: *Re Somech, Westminster Bank Ltd v Phillips* supra.

2 See the Law of Property Act 1925 s 21; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 40.

3 As to parental responsibility see the Children Act 1989 ss 2-4 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 133 et seq.

4 Ibid s 3(3). Before 14 October 1991 (ie the date on which s 3 came into force), a guardian had such a power (see the Guardianship Act 1973 s 7(1) (repealed), replacing the Tenures Abolition Act 1660 s 9 (repealed)) but a parent did not have such a power. As to the power of a guardian or minor under the former law to give a receipt for the minor's property see *M'Creight v M'Creight* (1849) 13 I Eq R 314; *Re Cresswell* (1881) 45 LT 468.

5 The Court of Protection has jurisdiction with respect to the property of a mentally disordered person: see the Mental Health Act 1983 ss 95, 96; and MENTAL HEALTH vol 30(2) (Reissue) PARA 681 et seq.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 487.

7 As to gifts to non-charitable societies see PARA 338 ante.

8 See *Leahy v A-G for New South Wales* [1959] AC 457 at 477, [1959] 2 All ER 300 at 306, PC.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/A. WRONGFUL ACT OF DONEE/340. Undue influence or fraud.

(ii) Disqualification for Benefiting

A. WRONGFUL ACT OF DONEE

340. Undue influence or fraud.

A gift by will which has been obtained by undue influence is liable to be set aside¹, as also is a gift obtained fraudulently, whether the fraud was practised on the testator in his lifetime or by

forgery after his death². Thus a donee will not be allowed to avail himself of a legacy which has been given to him under a particular character which he has falsely assumed for the purpose of obtaining the benefit, and which is shown or is inferred to be the only motive for it³. Questions of undue influence or fraud must be raised in the court of probate⁴.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 323; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 841 et seq; LEGAL PROFESSIONS vol 66 (2009) PARA 810.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 325-326.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 326.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 326. As to the probate court see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 74. As to secret trusts see PARAS 509-511 post; and TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/A. WRONGFUL ACT OF DONEE/341. Murder and manslaughter.

341. Murder and manslaughter.

It is contrary to public policy that a person should be allowed to claim a benefit resulting from his own crime¹. Accordingly, a donee who is proved² to be guilty of the murder or manslaughter of the testator, or of any other serious criminal act which resulted in the testator's death, cannot take any benefit under his will³, except in so far as this rule can be and is modified by the court in exercise of its powers under the Forfeiture Act 1982. That Act confers on the court a discretionary power in a case of manslaughter or other criminal act resulting in death (but not where the donee stands convicted of murder⁴) to modify the effect of the rule of public policy in certain circumstances⁵.

Where the above rule operates to preclude a person from acquiring a benefit under a will, the property goes to the other persons entitled, if it is a gift to a class⁶, or, if the exclusion of the donee effects an intestacy as to the property in question, to the persons, other than the donee⁷, entitled on intestacy⁸, and not to the Crown as bona vacantia, save in so far as the Crown may be entitled under the intestacy provisions in the ordinary way⁹.

It appears that the donee is entitled to the property if the will is made in the interval between the wound and the death¹⁰.

A person suffering from mental disorder is not debarred from taking a benefit under the will of a person whom he has killed while so suffering¹¹.

1 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, CA, per Fry LJ. See also *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 596-599, [1938] 2 All ER 602 at 605-607, HL; and INSURANCE vol 25 (2003 Reissue) PARA 529. The rule laid down in *Cleaver v Mutual Reserve Fund Life Association* supra is, it appears, restricted to the assertion of a claim by the criminal or his representatives, and third persons acquiring a title in good faith to personal property through the criminal may in some cases have protection: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1486; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 388; PERSONAL PROPERTY vol 35 (Reissue) PARAS 1222-1224. An assignee of the offender's interest in an insurance policy, such as a mortgagee, may obtain payment under it (see eg *Davitt v Titcumb* [1990] Ch 110, [1989] 3 All ER 417; *Dunbar v Plant* [1998] Ch 412, CA sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289, CA); but the offender cannot benefit from this (*Davitt v Titcumb* supra).

2 In civil proceedings the certificate of a conviction for murder or manslaughter is evidence of the commission of the crime: Civil Evidence Act 1968 s 11(1). As to the standard of proof required in other cases see eg *Re Dellow's Will Trusts*, *Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR

451 (where the testator and the beneficiary died on the same occasion in circumstances suggesting the unlawful killing of the testator by the beneficiary). See also CIVIL PROCEDURE vol 11 (2009) PARA 1208; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 160. If it is proved by admissible evidence that the donee killed the testator, the burden is on the donee or the persons claiming through him to show that the act was not criminal: *Re Pollock, Pollock v Pollock* [1941] Ch 219, [1941] 1 All ER 360. See also *Re Callaway, Callaway v Treasury Solicitor* [1956] Ch 559 at 562, [1956] 2 All ER 451 at 452.

3 *Re Hall, Hall v Knight and Baxter* [1914] P 1, CA (manslaughter); *Re Callaway, Callaway v Treasury Solicitor* [1956] Ch 559, [1956] 2 All ER 451; *Re Giles, Giles v Giles* [1972] Ch 544, [1971] 3 All ER 1141 (manslaughter; diminished responsibility); *Re Royse, Royse v Royse* [1985] Ch 22, [1984] 3 All ER 339, CA (manslaughter; diminished responsibility); *Re K* [1985] Ch 85, [1985] 1 All ER 403 (affd [1986] Ch 180, [1985] 2 All ER 833, CA) (manslaughter). The rule also applies to aiding and abetting suicide: *Dunbar v Plant* [1998] Ch 412, CA sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289, CA.

The motives and degree of culpability do not affect the application of the rule: *Re Hall, Hall v Knight and Baxter* supra at 7 per Hamilton LJ; *Dunbar v Plant* supra at 307-311 and 1280-1284 per Phillips LJ (disapproving the opinions expressed in *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1970] 2 QB 626, [1970] 2 All ER 702 and *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, [1981] 1 All ER 769, DC, and the decision in *Re H* [1990] 1 FLR 441, that the rule might not apply to the less culpable categories of manslaughter). However, the rule does not apply in cases of manslaughter by reckless or drunken driving, mainly for policy reasons to do with making insurance available to the victim: see *Dunbar (administrator of the estate of Dunbar) v Plant* supra at 307 and 1279-1280 per Phillips LJ. As to murder, manslaughter and diminished responsibility see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 89 et seq.

As to the application of the rule to interests arising other than under a will see *Re Sigsworth, Bedford v Bedford* [1935] Ch 89 (intestacy); *R v Chief National Insurance Comr, ex p Connor* supra (widow's allowance); *Re K* supra (joint property); *Davitt v Titcumb* [1990] Ch 110, [1989] 3 All ER 417 (increase in value of equity of redemption as a result of mortgage being paid off out of joint life policy); *Jones v Roberts* [1995] 2 FLR 422 (intestacy); *Re S* [1996] 1 WLR 235 (joint life policy); *Dunbar (administrator of the estate of Dunbar) v Plant* supra (joint property and a trust of an insurance policy); *Re DWS* [2001] Ch 568, [2001] 1 All ER 97, CA (intestacy).

4 See the Forfeiture Act 1982 s 5 (amended by the Social Security Act 1986 s 76(1), (4)).

5 See the Forfeiture Act 1982 ss 1, 2; and PARA 342 post. The Forfeiture Act 1982 came into force on 13 October 1982: see s 7(2); and PARA 342 note 1 post. Before that date the court had no power to mitigate the effect of the rule of public policy.

6 *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98.

7 A donee can no more benefit under the intestacy of a person whose death he has caused than he can under that person's will: *Re Sigsworth, Bedford v Bedford* [1935] Ch 89. See also *Re Crippen* [1911] P 108. Others may, however, benefit under an intestacy which might not have occurred but for the killing: see *Re Robertson, Marsden v Marsden* (1963) 107 Sol Jo 318; *Re Hunter's Executors, Petitioners* 1992 SLT 1141; *Re Jones, Jones v Midland Bank Trust Co Ltd* [1997] 1 FLR 246, CA (where in all three cases a gift over in the event of the killer of the testator predeceasing the testator did not take effect).

8 As to the persons entitled on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

9 *Re Sigsworth, Bedford v Bedford* [1935] Ch 89; *Re Callaway, Callaway v Treasury Solicitor* [1956] Ch 559, [1956] 2 All ER 451. As to the intestacy provisions see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq. As to bona vacantia see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 933 et seq; CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 613-614.

10 See *Lundy v Lundy* (1895) 24 SCR 650 at 653 per Taschereau J (a Canadian case). It seems that the effect of revival of the will (see PARA 402 post) or republication (see PARA 405 post) after the wound would be the same. In other cases, eg poisoning, the outcome might well depend on the testator's knowledge of the act.

11 *Re Batten's Will Trusts* (1961) 105 Sol Jo 529. Similarly, he is not debarred from taking under the intestacy of a person whom he has killed: *Re Houghton, Houghton v Houghton* [1915] 2 Ch 173; *Re Pitts, Cox v Kilsby* [1931] 1 Ch 546. As to the burden of proving that a killing was not criminal see note 2 supra. As to diminished responsibility, which in general does not prevent the rule from applying see *Re Giles, Giles v Giles* [1972] Ch 544, [1971] 3 All ER 1141; *Re Royse, Royse v Royse* [1985] Ch 22, [1984] 3 All ER 339, CA; *Re H* [1990] 1 FLR 441 (the decision in this case, that the rule did not apply, was disapproved in *Dunbar v Plant* [1998] Ch 412, CA sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289, CA); *Re S* [1996] 1 WLR 235; *Jones v Roberts* [1995] 2 FLR 422.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/A. WRONGFUL ACT OF DONEE/342. Unlawful killing; modification of forfeiture rule.

342. Unlawful killing; modification of forfeiture rule.

Before 13 October 1982¹ the rule of public policy preventing a murderer from claiming a benefit from his own crime² applied inflexibly in relation to manslaughter also³, but on and after that date a court may make an order modifying the effect of the rule in a case of unlawful killing, except where the perpetrator stands convicted of murder⁴. The court may not make such an order unless it is satisfied that, having regard to the conduct of the offender and of the deceased and such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be modified in that case⁵. Such an order may modify the effect of the rule in respect of any interest in property to which the court's determination relates⁶ which the offender would otherwise have acquired either, where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests⁷, or, in the case of any such interest in property, by excluding the application of the rule in respect of part of the property⁸. These words are an extension, not a restriction, of the court's power to modify the effect of the rule, which includes power to relieve the offender wholly from the effect of the rule in an appropriate case⁹. On the making of an order modifying the effect of the rule, the rule has effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order¹⁰.

Where a person stands convicted of an offence of which unlawful killing is an element, the court may not make an order modifying the effect of the rule in that case unless proceedings for the purpose are brought before the expiry of the period of three months beginning with his conviction¹¹.

1 The date on which the Forfeiture Act 1982 came into operation: see s 7(2). The court may not make an order under s 2 (see the text and note 4 *infra*) in respect of any interest in property which, in consequence of the rule of public policy set out in the text to note 2 *infra*, had been acquired before 13 October 1982 by a person other than the offender or a person claiming through him: s 2(7). 'Acquired' in s 2(7) denotes property which has actually been transferred to the person entitled to it as a result of the rule, or in respect of which he has acquired an indefeasible right to have it transferred, and does not extend to property which, when s 2 came into force, was still in the hands of personal representatives dealing with the administration of the estate: *Re K* [1986] Ch 180, [1985] 2 All ER 833, CA. Subject to the Forfeiture Act 1982 s 2(7), an order under s 2 may be made whether the unlawful killing occurred before, on or after 13 October 1982: s 7(4). The Forfeiture Act 1982 does not itself extend to Northern Ireland (s 7(3)), but corresponding provision has been made for Northern Ireland by Order in Council (see s 6; and the Forfeiture (Northern Ireland) Order 1982, SI 1982/1082 (NI 14) (as amended)).

2 As to this rule see PARA 341 *ante*. The rule is referred to in the Forfeiture Act 1982 as the 'forfeiture rule': see s 1(1).

3 *Re Hall, Hall v Knight and Baxter* [1914] P 1, CA; *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98; *Re Giles, Giles v Giles* [1972] Ch 544, [1971] 3 All ER 1141; *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, [1981] 1 All ER 769, DC; *Re Royse, Royse v Royse* [1985] Ch 22, [1984] 3 All ER 339, CA. See also PARA 341 note 3 *ante*.

4 See the Forfeiture Act 1982 ss 2(1), 5 (amended by the Social Security Act 1986 s 76(1), (4)). Reference in the Forfeiture Act 1982 to a person who has unlawfully killed another includes a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other; and references in that Act to unlawful killing are to be interpreted accordingly: s 1(2). See also *Dunbar v Plant* [1998] Ch 412, CA sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289, CA (court's powers exercised in a case of aiding and abetting suicide).

5 Forfeiture Act 1982 s 2(2). The court is not limited to allowing the applicant what he might have obtained on an application under the Inheritance (Provision for Family and Dependents) Act 1975 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 *et seq*): *Re K* [1986] Ch 180, [1985] 2 All ER 833, CA. The first and

PARAMOUNT consideration must be whether the culpability attending the beneficiary's criminal conduct was such as to justify the application of the forfeiture rule at all: *Dunbar v Plant* [1998] Ch 412 at 438, sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289 at 312, CA, per Phillips LJ. For decisions that forfeiture should be relieved see *Re K* [1985] Ch 85, [1985] 1 All ER 403 (affd [1986] Ch 180, [1985] 2 All ER 833, CA); *Re H* [1990] 1 FLR 441; *Re S* [1996] 1 WLR 235; *Dunbar (administrator of the estate of Dunbar) v Plant* supra. Contrast *Re Murphy, Dalton v Latham* [2003] EWHC 796 (Ch), [2003] All ER (D) 305 (Apr), [2003] WTLR 687, where relief was refused.

6 For these purposes, 'property' includes any chose (or thing) in action or incorporeal movable property: Forfeiture Act 1982 s 2(8). The interests in property which may be made the subject of an order under s 2 are:

- 1 (1) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired:
 1. (a) under the deceased's will or the law relating to intestacy (see s 2(1), (4)(a)(i));
 - 2 (b) on the nomination of the deceased in accordance with the provisions of any enactment (see s 2(1), (4)(a)(ii)); or
 - 2 (c) as a donatio mortis causa made by the deceased (see s 2(1), (4)(a)(iii));
- 2 (2) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person (see s 2(1), (4)(b)).

As to donations mortis causa see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 340; GIFTS vol 52 (2009) PARA 271 et seq.

7 Ibid s 2(5)(a).

8 Ibid s 2(5)(b).

9 *Re K* [1985] Ch 85, [1985] 1 All ER 403 (affd [1986] Ch 180, [1985] 2 All ER 833, CA); *Dunbar v Plant* [1998] Ch 412 at 436-437, sub nom *Dunbar (administrator of the estate of Dunbar) v Plant* [1997] 4 All ER 289 at 310-311, CA, per Phillips LJ.

10 Forfeiture Act 1982 s 2(6).

11 Ibid s 2(3).

UPDATE

342 Unlawful killing; modification of forfeiture rule

NOTE 5--See also *Land v Land* [2006] All ER (D) 71 (Oct).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/B. DONEE OR SPOUSE AN ATTESTING WITNESS/343. Gift to witnesses.

B. DONEE OR SPOUSE AN ATTESTING WITNESS

343. Gift to witnesses.

Any beneficial devise, legacy, estate, interest, gift or appointment, other than charges or directions for the payment of debts, so far as it concerns any person (other than one whose attestation is superfluous¹) attesting the execution of any will² by which it is given, or the wife or husband of that person, or any person claiming under that person or the wife or husband, is

null and void³. A power in a will enabling a solicitor-trustee to charge profit costs against the estate in the will of a person who died before 1 February 2001 is such a beneficial interest⁴, but is treated as remuneration for services and not as a gift in relation to wills of persons dying on or after that date⁵. Where there is a joint tenancy under a will and one of the joint tenants attests the will, the other takes the whole⁶. A gift to a witness merely as trustee is valid⁷.

1 See PARA 346 post.

2 As to wills of members of the armed forces on actual military service and mariners and seamen at sea, however, see PARAS 371-372 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 113 et seq.

3 Wills Act 1837 s 15. As from a day to be appointed, s 15 applies to the attestation of a will by a person to whose civil partner there is given or made any such disposition as is described in s 15 as it applies in relation to a person to whose spouse there is given or made any such disposition: Civil Partnership Act 2004 s 71, Sch 4 para 3. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post. Before the Wills Act 1837 s 15 is applied, the will must be construed. Thus in the case of a bequest by the testator to a daughter who attests the will, with remainder to her children, where there are children in existence at the testator's death, the effect of the failure of the gift to the daughter is to accelerate the gift to her children: *Jull v Jacobs* (1876) 3 ChD 703; *Re Clark, Clark v Randall* (1885) 31 ChD 72. If there are no children then in existence, there can be no acceleration, and there is an intestacy until the birth of children: *Re Townsend's Estate, Townsend v Townsend* (1886) 34 ChD 357; and see *Kearney v Kearney* [1911] 1 IR 137, 1r CA. If, however, the gift is to the daughter or her children, so that the gift to the children is substitutional, it fails with the gift to the daughter: *Aplin v Stone* [1904] 1 Ch 543; *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713. As to the acceleration of subsequent interests see PARA 472 post. Although the gift is null and void, that does not preclude the court from looking at the words of gift for the purposes of ascertaining the testator's intention when he made the document in which the gift is contained: *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793. As to the liability of solicitors who fail to notice that a will has been attested by a beneficiary's husband see *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; and LEGAL PROFESSIONS vol 66 (2009) PARA 820.

4 *Re Barber, Burgess v Vinnicome* (1886) 31 ChD 665; *Re Pooley* (1888) 40 ChD 1, CA. As to the right of a solicitor to charge profit costs generally see LEGAL PROFESSIONS vol 66 (2009) PARA 813.

5 Trustee Act 2000 ss 28(4)(a), 33(2); Trustee Act 2000 (Commencement) Order 2001, SI 2001/49.

6 *Young v Davies* (1863) 2 Drew & Sm 167. See also *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594.

7 *Cresswell v Cresswell* (1868) LR 6 Eq 69. See also *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v Barry* [1936] Ch 520, [1936] 2 All ER 93 (where a gift to the person who should be abbess of a convent at the time of the death of the testatrix was a gift in trust for the convent, and hence was not invalidated by reason of one of two nuns who witnessed the will afterwards becoming abbess and being abbess at the death of the testatrix).

UPDATE

343 Gift to witnesses

NOTE 3--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/B. DONEE OR SPOUSE AN ATTESTING WITNESS/344. Exceptions to general rule.

344. Exceptions to general rule.

Where, by means of an oral trust, a beneficial interest is conferred on an attesting witness who is, at the time of attestation, unaware of the secret trust in his favour, the gift is valid¹. The marriage of a donee to an attesting witness after attestation does not affect the validity of the

gift². A beneficiary's interest is not rendered void if it could not be predicted at the time when the will was attested that he would be a donee³. A beneficiary who and whose spouse did not witness an earlier will containing a gift to him, but who or whose spouse witnesses a later will repeating the gift to him and purporting to revoke the earlier will, may still be able to take the gift under the earlier will⁴.

1 See *Re Young, Young v Young* [1951] Ch 344, [1950] 2 All ER 1245 (following *O'Brien v Condon* [1905] 1 IR 51; and not following *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594). See also *Sullivan v Sullivan* [1903] 1 IR 193.

2 *Thorpe v Bestwick* (1881) 6 QBD 311.

3 *Re Royce's Will Trusts, Tildesley v Tildesley* [1959] Ch 626, [1959] 3 All ER 278, CA (where it was held that a solicitor who is not appointed as an executor or original trustee is not, on subsequently being appointed a trustee, prevented from relying on a charging clause in the will or taking the trustee's remuneration provided by the will, even though he was an attesting witness).

4 *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793 (where it was held that the revocation of the earlier will was conditional on the repeated gift in the later will being effective). See also PARA 400 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/B. DONEE OR SPOUSE AN ATTESTING WITNESS/345. Gift by codicil.

345. Gift by codicil.

A gift by will to a legatee is not forfeited by his attesting a codicil confirming the will¹, unless he receives a benefit by the codicil, as, for example, where the codicil makes a contingent gift absolute²; but the fact that the codicil, by revoking gifts in the will, increases the residue of which he gets a share is not such a benefit³. Conversely, a codicil duly executed confirming a will containing a gift to an attesting witness to the will renders the gift valid⁴, and the validity so acquired is not destroyed by the legatee's attesting a subsequent codicil⁵. The gift is avoided only where the witness has attested the instrument under which he takes⁶, and a gift in a will consisting of separate sheets of paper separately attested may be valid if the legatee has not attested the sheet on which his gift appears⁷.

1 *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594; *Gurney v Gurney* (1855) 3 Drew 208. See also *Tempest v Tempest* (1856) 2 K & J 635 at 643; *Re Marcus, Marcus v Marcus* (1887) 57 LT 399.

2 *Gaskin v Rogers* (1866) LR 2 Eq 284.

3 *Gurney v Gurney* (1855) 3 Drew 208.

4 *Anderson v Anderson* (1872) LR 13 Eq 381; *Re Trotter, Trotter v Trotter* [1899] 1 Ch 764.

5 *Thorpe v Bestwick* (1881) 6 QBD 311; *Re Trotter, Trotter v Trotter* [1899] 1 Ch 764.

6 *Re Trotter, Trotter v Trotter* [1899] 1 Ch 764.

7 *Re Craven, Crewdson v Craven* (1908) 24 TLR 750.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(ii) Disqualification for Benefiting/B. DONEE OR SPOUSE AN ATTESTING WITNESS/346. Superfluous attestation.

346. Superfluous attestation.

If more persons than are necessary sign their names to a will, then, in applying the provisions relating to gifts to witnesses¹, the attestation by a person to whom or to whose spouse there is given or made any such disposition must be disregarded if the will is duly executed without his attestation and without that of any other such person². This applies to the will of any person dying after 30 May 1968, whenever the will was executed³. In the case of a person who died before that date, the presumption was that all such persons signed as witnesses, and consequently legacies given to them or their spouses by the will were void; if more than two persons appeared to be attesting witnesses, some of them being legatees, all the names would be included in the probate, so that the question whether the legatees did or did not sign as witnesses might be decided in a court of equity⁴. In some cases, however, the court of probate itself dealt with this question, and omitted the names from the probate. If, after execution was complete, a third person added his name, the court did not without cogent evidence conclude that the third person signed as a witness⁵.

If the testator is domiciled in England or Wales but makes his will elsewhere, then, even though by the joint effect of the Wills Act 1963⁶ and the law of the foreign country no witnesses are necessary, a gift to a witness is nevertheless void unless the evidence shows that the testator intended to make an unattested will⁷. A gift made by the will of a member of the royal forces on actual military service, or any mariner or seaman being at sea, to a witness attesting the will is, however, valid, for the Wills Act 1837⁸ exempts such a will from the requirement of attestation⁹.

1 See PARAS 343-345 ante.

2 Wills Act 1968 s 1(1). This abrogates the previous rule as set out in *Re Bravda* [1967] 2 All ER 1233, [1967] 1 WLR 1080 (revsd on appeal [1968] 2 All ER 217, [1968] 1 WLR 479, CA). As from a day to be appointed, the Wills Act 1968 s 1 applies to the attestation of a will by a person to whose civil partner there is given or made any such disposition as is described in the Wills Act 1837 s 15 (see PARA 343 ante) as it applies in relation to a person to whose spouse there is given or made any such disposition: Civil Partnership Act 2004 s 71, Sch 4 para 3. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post.

3 Wills Act 1968 s 1(2).

4 *Wigan v Rowland* (1853) 11 Hare 157; *Cozens v Crout* (1873) 42 LJ Ch 840. See also *Re Mitchell* (1841) 2 Curt 916; *Re Forest* (1861) 2 Sw & Tr 334; *Re Raine* (1865) 11 Jur NS 587.

5 *Randfield v Randfield* (1860) 8 HL Cas 225 at 228 note (c); *Re Sharman* (1869) LR 1 P & D 661; *Re Murphy* (1873) IR 8 Eq 300; *Re Smith* (1889) 15 PD 2; *Kitcat v King* [1930] P 266.

6 See the Wills Act 1963 s 1; and PARA 310 ante.

7 *Re Priest, Belfield v Duncan* [1944] Ch 58, [1944] 1 All ER 51 (holograph will made in Scotland). Although the Wills Act 1837 does not apply to Scotland (see s 35), it does apply to a will, although made in Scotland, of a testator domiciled in England or Wales. The essential validity of testamentary gifts is governed by the law of the testator's domicile in the case of a will of movables and by the *lex situs* in the case of a will of immovables: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 456.

8 See *ibid* s 11 (as amended); and PARAS 371-372 post.

9 *Re Limond, Limond v Cunliffe* [1915] 2 Ch 240.

UPDATE

346 Superfluous attestation

NOTE 2--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(4) DONEES/(iii) Uncertainty as to Donee/347. Donee must be identifiable.

(iii) Uncertainty as to Donee

347. Donee must be identifiable.

In order to be a donee under a will, a person must be so named or described that his identity can be established with certainty; otherwise the gift is void¹. Difficulty of ascertainment is not in itself fatal to the validity of the gift; it is a matter of degree, and it is only when, on the evidence², the gift is so vague, or the difficulty is so great, that it must be treated as virtually incapable of resolution, that the gift is void for uncertainty³.

If the will requires or allows, the description may be acquired by the donee after the date of the will on any future event and contingency, or, it seems, by the testator's own act in the ordinary course of his affairs or in the management of his property, or by the acts of third persons⁴, although, if the act is testamentary in character, the proper formalities must be observed⁵. There may thus be a gift to a child en ventre sa mère⁶, or other persons unborn or not ascertained at the date of the will, or to a class, that is to say to persons who are intended to be ascertained as those composing a described fluctuating body of persons at a particular future time, and are to take one divisible subject in certain proportionate shares, the amount of which depends on the ascertainment of all those persons⁷. In the case, however, of such gifts to take effect in the future, the rules of law designed to prevent perpetuity must be observed⁸.

1 For examples of gifts void for uncertainty in this respect see *Lord Cheyney's Case* (1591) 5 Co Rep 68a at 68b; *Webb's Case* (1607) 1 Roll Abr 609 (20 of the poorest of the testator's kindred); *Beal v Wyman* (1650) Sty 240 (the heirs male of any of the testator's sons or next of kin); *Bate v Amherst* (1663) T Raym 82; *Doe d Hayter v Joinville* (1802) 3 East 172 (to A's family, where no certain meaning could be given to the words); *Doe d Smith v Fleming* (1835) 2 Cr M & R 638 (to the younger branches of the family of W, where several interpretations were equally possible); *Smithwick v Hayden* (1887) 19 LR Ir 490, Ir CA ('any female niece or female relative of A provided she marries a person of the name of B, residing in C, and . . . a Roman Catholic'); *Re Stephenson, Donaldson v Bamber* [1897] 1 Ch 75, CA (gift to 'the children of the deceased son (named B) of my father's sister'; there were three such sons; no evidence to clear up the ambiguity appears to have been tendered); *Re Walter's Will Trusts, National Provincial Bank Ltd v Board of Guardians and Trustees for Relief of Jewish Poor, Registered* (1962) 106 Sol Jo 221 (bequest to each of 'my daughters who shall marry in the Jewish faith'; bequest void). Cf para 431 note 7 post. See also *Sir Litton Strobe v Lady Russel* (1707) 2 Vern 621 at 624 per Tracy J; *Pyot v Pyot* (1749) 1 Ves Sen 335 at 337 (citing *Huckstep v Mathews* (1685) 1 Vern 362); *Flint v Warren* (1847) 15 Sim 626; *Murdoch v Brass* (1904) 6 F 841. A direction to trustees to make payments to such of the testator's children and grandchildren as they should think most deserving was held not void for uncertainty (*Mitchell's Trustees v Fraser* 1915 SC 350); nor was a direction to make payments to such of the testator's children as appeared to be most in need (*Magee v Magee* [1936] 3 All ER 15, PC), nor one to make payments to necessitous nieces and nephews (*Re Parker's Will, Kilroy and Callan v Parker and McGauran* [1966] IR 309); nor was a trust for distribution among political bodies in the United Kingdom void, all the bodies in the class being capable of ascertainment (*Re Ogden, Brydon v Samuel* [1933] Ch 678). Where it is not necessary for the whole class to be ascertained for the gift to take effect, a gift to 'friends' may be valid: *Re Barlow's Will Trusts* [1979] 1 All ER 296, [1979] 1 WLR 278. However, it is otherwise if the whole class has to be ascertained: *Re Lloyd's Trust Instruments* (24 June 1970, unreported), referred to in *Brown v Gould* [1972] Ch 53 at 56-57, [1971] 2 All ER 1505 at 1507. Cf the cases referred to in PARA 309 note 9 ante. Where there is a power or a discretionary trust, certainty as to all the objects is not, in general, essential: see POWERS vol 36(2) (Reissue) PARA 215; TRUSTS vol 48 (2007 Reissue) PARA 679.

2 In the case of a testator dying on or after 1 January 1983, evidence of his intention may be admitted in certain circumstances: see PARA 483 post.

3 *Re Eden, Ellis v Crampton* [1957] 2 All ER 430, [1957] 1 WLR 788. As to uncertainty in relation to construction generally see PARA 554 et seq post.

4 *Stubbs v Sargon* (1837) 2 Keen 255 at 269 per Lord Langdale MR; on appeal (1838) 3 My & Cr 507 at 511 per Lord Cottenham LC (partners, or the person to whom the testatrix might have disposed of her business).

5 See PARA 351 et seq post.

6 *Marsh v Kirby* (1634) 1 Rep Ch 76; *Burdet v Hopegood* (1718) 1 P Wms 486 at 487 (gift over in case testator should leave no son at the time of his death; held not to have taken effect owing to birth of posthumous son); *Mogg v Mogg* (1815) 1 Mer 654 at 705; *Blackburn v Stables* (1814) 2 Ves & B 367. As to the construction of certain gifts under which a child en ventre sa mère is considered as living see PARA 647 post.

7 *Bentinck v Duke of Portland* (1877) 7 ChD 693 at 698. As to class gifts see PARA 593 et seq post.

8 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1071 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(i) Instructions for a Will/348. Matters with which the will may deal.

(5) PREPARATION AND EXECUTION

(i) Instructions for a Will

348. Matters with which the will may deal.

It is desirable that a will, having regard to the purposes for which it may be made¹, should make provision in an orderly manner not only for the disposition of the testator's property but also for all other matters in relation to his affairs which he wishes to take effect after his death². Thus it should provide for the appointment of executors³, and, if the testator has children who are minors, it may be appropriate to provide for their guardianship⁴. If the testator desires that the statutory order⁵ in which assets are applied for the payment of his debts and liabilities be varied, the will should make express provision accordingly⁶. He may also effectually alter the normal rules for the incidence of inheritance tax⁷. It is essential, where property is settled, to guard against any infringement of the rule against perpetuities or accumulations⁸. It should be borne in mind by the testator that after his death a spouse, former spouse, child or dependant or cohabitee⁹ for whom reasonable financial provision has not been made may apply to the court under the Inheritance (Provision for Family and Dependents) Act 1975 for an order for such provision to be made from the testator's estate¹⁰.

It must be ensured that the will as prepared has in all respects the knowledge and approval of the testator, as these are essential to validity¹¹. If he proposes to benefit the person who draws up the will, that person should guard against suggestions of advantage taken or undue influence exercised in the preparation of the will¹². If the testator has been suffering from a mental disorder, it is well to bear in mind that the person who will in due course obtain probate may have the burden of proving that the testator had capacity to make the will¹³.

For purposes of probate, it is desirable to prepare a will in such a form that it can be easily photographed¹⁴.

1 See PARA 302 ante.

2 Under the Law of Property Act 1925 the Lord Chancellor may prescribe forms which may be incorporated in a will: see s 179; and the Statutory Wills Forms 1925, SR & O 1925/780.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 6 et seq.

4 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148 et seq.

5 le the order set out in the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 416 et seq.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 410 et seq.

7 The rule is that, in the absence of express provision, the inheritance tax on United Kingdom free estate is paid out of residue: see the Inheritance Tax Act 1984 s 211; and INHERITANCE TAXATION vol 24 (Reissue) PARA 651. The power to alter the incidence of inheritance tax is circumscribed by the rule that inheritance tax cannot be made payable out of an exempt gift: see s 41; and INHERITANCE TAXATION vol 24 (Reissue) PARA 534.

8 See generally PERPETUITIES AND ACCUMULATIONS.

9 As to the persons for whom provision may be made under the Inheritance (Provision for Family and Dependents) Act 1975 see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 667. The category of cohabitee (ie someone who, during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased) was introduced in relation to persons dying on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 2, amending the Inheritance (Provision for Family and Dependents) Act 1975 s 1. As from a day to be appointed, the category of civil partner is also included: see s 1 (prospectively amended by the Civil Partnership Act 2004 s 71, Sch 4 Pt 2 para 15). At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post.

10 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq. On such an application the court is no longer required to have regard to the testator's reasons for failing to make the reasonable financial provision, but it may have regard to the applicant's conduct or any other matter which it considers relevant: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 676.

11 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 316; and PARAS 324-325 ante.

12 See *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL; and LEGAL PROFESSIONS vol 66 (2009) PARA 810.

13 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 315. A statutory declaration could be made to support a will made in a lucid interval. Where there is any doubt about a testator's capacity, the will should be witnessed, if at all possible, by the testator's medical attendant and solicitor and they should make statements as to the testator's capacity: see *Kenward v Adams* (1975) Times, 29 November; *Re Simpson, Schaniel v Simpson* (1977) 121 Sol Jo 224; *Buckenham v Dickinson* (26 February 1997, unreported).

14 53 Law Society's Gazette 81. The will should be typed in black on white paper, and should be on foolscap or A4 paper; but size of type is not of itself important, provided that the will is the above size, as a copy of a will clearly typed and reproduced life-size will always be legible: see (1974) 124 NLJ 1101.

UPDATE

348 Matters with which the will may deal

NOTE 9--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(i) Instructions for a Will/349. Testamentary form unnecessary.

349. Testamentary form unnecessary.

While the desirability and advantages of a professionally drawn will are obvious, testamentary form is not necessary to constitute a valid will, provided that the document is executed in accordance with the requirements of English law¹ and with the requisite intention². Thus an instrument duly executed, although apparently intended as preliminary to a more formal document, may be admitted to probate if there is evidence that the testator had the lasting

intention that the document should be dispositive and operate provisionally until a more formal will was prepared³, as may a document not intended to be admitted to probate but intended to operate in PARALLEL with a formal will⁴. A memorandum which is merely deliberative or initiatory and does not show the testator's final intention will not, however, be admitted to probate⁵; and a paper which merely expresses an intention to instruct a solicitor to prepare a will for the purpose of leaving a certain legacy is not testamentary⁶.

1 *Whyte v Pollok* (1882) 7 App Cas 400 at 409 per Lord Selborne LC. See also *Masterman v Maberly* (1829) 2 Hag Ecc 235 at 248; *Oldroyd v Harvey* [1907] P 326; *Re Beech, Beech v Public Trustee* [1923] P 46, CA. The presumption of due execution applies to wills: see PARA 369 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 304. The validity of a will as regards movables depends on the law of the testator's domicile, and as regards immovables on the *lex situs*: see PARA 310 ante; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 456. As to forms of will see PARA 348 note 2 ante.

2 See PARA 350 post.

3 *Bone and Newsam v Spear* (1811) 1 Phillim 345 ('heads of a will'); *Barwick v Mullings* (1829) 2 Hag Ecc 225 (instructions for will, duly executed); *Hattatt v Hattatt* (1832) 4 Hag Ecc 211 ('memorandum of my intended will'); *Castle v Torre* (1837) 2 Moo PCC 133; *Re Fisher* (1869) 20 LT 684; *Whyte v Pollok* (1882) 7 App Cas 400 (notes for an intended settlement); *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Blind* [1999] All ER (D) 81, sub nom *Re Chapman* (1998-99) 1 ITELR 863 (outline will provisions summarising the testator's incomplete instructions for an intended will). See also *Re Foster, Foster v Foster* (1922) 67 Sol Jo 199 (pencil notes on the epitome of a will).

4 *Re Berger* [1990] Ch 118, [1989] 1 All ER 591, CA (Hebrew will or zavah intended by the deceased to be given effect by Jewish religious courts).

5 *Matthews v Warner* (1798) 4 Ves 186; *Mathew v Warner* (1799) 5 Ves 23 ('plan of a will'); *Gillow and Orrell v Bourne* (1831) 4 Hag Ecc 192 (intention abandoned); *Boughton-Knight v Wilson* (1915) 32 TLR 146 (holograph document, not intended to be testamentary, but only a draft in alternative form).

6 *Coventry v Williams* (1844) 3 Curt 787. See also *Hixon v Wytham* (1675) 1 Cas in Ch 248.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(i) Instructions for a Will/350. Testamentary intention necessary.

350. Testamentary intention necessary.

It is not necessary that the testator should intend to perform, or be aware that he has performed, a testamentary act¹, provided that he had the clear intention to make a revocable ambulatory disposition of his property which is to take effect on death². Such intention may be proved by extrinsic evidence³, and, if the formalities of execution have been complied with, the document may be admitted to probate⁴. The intention at the time of execution must be that the document should have immediate and unconditional effect as such revocable ambulatory disposition⁵. Where there is doubt whether a document is testamentary, the burden of proving that it is testamentary is on the person propounding it⁶.

1 *Milnes v Foden* (1890) 15 PD 105 at 107 per Hannen P. Thus the following instruments have been held to be testamentary: a deed of gift (*Habergham v Vincent* (1793) 2 Ves 204; *Thorold v Thorold* (1809) 1 Phillim 1; *Re Morgan* (1866) LR 1 P & D 214); articles of agreement (*Green v Froud* (1674) 3 Keb 310); a draft on a banker (*Bartholomew and Brown v Henley* (1820) 3 Phillim 317); a direction for payment by bankers (*Jones v Nicolay* (1850) 2 Rob Eccl 288); an order on a savings bank (*Re Marsden* (1860) 1 Sw & Tr 542); a letter (*Denny v Barton and Rashleigh* (1818) 2 Phillim 575; *Re Mundy* (1860) 2 Sw & Tr 119; cf *Passmore v Passmore* (1811) 1 Phillim 216 at 218); an invalid nomination under the Industrial and Provident Societies Act 1893 (*Re Baxter* [1903] P 12; and see PARA 349 note 3 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2503). Other informal instruments admitted to probate under the old law are mentioned in *Masterman v Maberly*

(1829) 2 Hag Ecc 235 at 247; and in *Griffin and Amos v Ferard* (1835) 1 Curt 97. See also *Rigden v Vallier* (1751) 2 Ves Sen 252 at 258.

2 *Re Berger* [1990] Ch 118 at 129-130, [1989] 1 All ER 591 at 599. See also *King's Proctor v Daines* (1830) 3 Hag Ecc 218 at 221; *Re Webb* (1864) 3 Sw & Tr 482; *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA.

3 *Re English* (1864) 3 Sw & Tr 586; *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Blind* [1999] All ER (D) 81, sub nom *Re Chapman* (1998-99) 1 ITELR 863. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 104. Similarly, evidence may be given that the document was not intended to be testamentary, although in form it appears to be so: *Trevelyan v Trevelyan* (1810) 1 Phillim 149; *Nichols v Nichols* (1814) 2 Phillim 180; *Lister v Smith* (1863) 3 Sw & Tr 282; *Re Nosworthy* (1865) 4 Sw & Tr 44. A statement in the document that it is not intended to be a will seems to be conclusive: *Ferguson-Davie v Ferguson-Davie* (1890) 15 PD 109. As to when documents referred to and identified in a will may be incorporated in it and included in the probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105.

4 *Cock v Cooke* (1866) LR 1 P & D 241; *Robertson v Smith* (1870) LR 2 P & D 43; *Re Slinn* (1890) 15 PD 156. See also *Cameron's Trustees v Mackenzie* 1915 SC 313; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA; *Warwick v Warwick* (1918) 34 TLR 475, CA. Following the formalities for execution of a will is itself strong evidence of a testamentary intention: *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Blind* [1999] All ER (D) 81, sub nom *Re Chapman* (1998-99) 1 ITELR 863.

5 The dispositions in a will may be conditional, but its execution may not: see *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA; and see PARAS 305 ante, 351 post.

6 *Griffin and Amos v Ferard* (1835) 1 Curt 97; *Coventry v Williams* (1844) 3 Curt 787; *Napper v Napper* (1846) 10 Jur 342. Before the jurisdiction to rectify wills was conferred (see PARA 408 post), the probate court would not add a word to the will, but it might omit a word from the probate, if necessary: *Re Swords* [1952] P 368, [1952] 2 All ER 281; *Re Cocke* [1960] 2 All ER 289, [1960] 1 WLR 491; *Re Morris, Lloyds Bank Ltd v Peake* [1971] P 62, [1970] 1 All ER 1057; *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256. Cf *Re Horrocks, Taylor v Kershaw* [1939] P 198, [1939] 1 All ER 579, CA; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 139.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/A. WRITING/351. Mode of writing.

(ii) Requisites for Formal Validity

A. WRITING

351. Mode of writing.

Every will other than a privileged will¹ must be in writing² and signed³ by or on behalf of⁴ the testator⁵, and the signature must be made or acknowledged⁶ in the presence of two witnesses present at the same time⁷. There are no restrictions as to the materials with which, and upon which, a will may be written⁸. A will may be made⁹ or altered in pencil as well as in ink¹⁰, but pencil alterations in a will written in ink are prima facie deliberative¹¹. If, however, in a will mainly written in ink, blanks are filled up in pencil before execution, the pencil additions may be included in the probate¹². A printed or lithographed form may be used, or part of such a form may be utilised¹³. The requirement that a will should be in writing means that a will cannot validly be executed so as to have effect conditionally on the happening of a future event where the condition is not set out in the will itself¹⁴.

1 As to the privileged wills of certain soldiers, sailors and airmen see PARAS 371-373 post.

2 As to the incorporation of documents referred to in a will in the probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105.

- 3 As to the signature see PARA 353 et seq post.
- 4 As to signature on the testator's behalf see PARA 355 post.
- 5 Wills Act 1837 s 9(a) (s 9 substituted by the Administration of Justice Act 1982 s 17).
- 6 See PARA 360 post.
- 7 Wills Act 1837 s 9(c) (as substituted: see note 5 supra). See also PARAS 362-363 post.
- 8 Swinburne on Wills (7th Edn) Pt IV s 25, pl 2. See also *Re Barnes, Hodson v Barnes* (1926) 43 TLR 71 (will written on an eggshell); *Re Slavinsky's Estate* (1989) 53 SASR 221 (will written in bad Ukrainian on the wall by the testator's bed; photograph of it accepted for probate purposes).
- 9 *Re Usborne* (1909) 25 TLR 519.
- 10 *Rymes v Clarkson* (1809) 1 Phillim 22 at 25. See also *Boughton-Knight v Wilson* (1915) 32 TLR 146.
- 11 *Rymes v Clarkson* (1809) 1 Phillim 22 at 25; *Re Hall* (1871) LR 2 P & D 256; *Re Adams* (1872) LR 2 P & D 367. See also *Re Bellamy* (1866) 14 WR 501.
- 12 See *Kell v Charmer* (1856) 23 Beav 195. In *Re Tonge* (1891) 66 LT 60, a revocation clause which had been cancelled in pencil was omitted from probate, the court being satisfied on the facts that the deletion was made before execution.
- 13 See the Interpretation Act 1978 s 5, Sch 1, Sch 2 para 4(1)(b) (meaning of 'writing'); and STATUTES vol 44(1) (Reissue) PARA 1388. See also *Re Moore* [1892] P 378. As to the interpretation of wills made on will forms see *Re Harrison, Turner v Hellard* (1885) 30 ChD 390, CA; *Re Spencer, Hart v Manston* (1886) 54 LT 597; *Re Smithers, Watts v Smithers* [1939] Ch 1015, [1939] 3 All ER 689. See also PARA 488 post.
- 14 *Corbett v Newey* [1998] Ch 57, [1996] 2 All ER 914, CA; and see PARA 305 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/B. DATE/352. Date.

B. DATE

352. Date.

There is no requirement in law that a will should be dated, and the lack of a date or the inclusion of a wrong one cannot invalidate a will¹. An exception is that an appointment by will (or other instrument) of a guardian of a minor must be dated².

¹ *Corbett v Newey* [1998] Ch 57 at 64, 67, 70, [1996] 2 All ER 914 at 920, 923, 926, CA. If a will is dated, the date it should bear is the date of its execution by the testator.

² See the Children Act 1989 s 5(5); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/353. Signature essential.

C. SIGNATURE

353. Signature essential.

To be valid, a will must be signed by the testator, or by some other person in his presence and by his direction¹. The signature must be intended by the testator as an act of execution², and it must appear that he intended by his signature to give effect to the will³. A practical approach is demanded by these words⁴. A normal signature, placed at the foot of a testamentary document, would in most cases carry the implication that the testator intended the signature to give testamentary effect to the document, and affirmative evidence would be needed to rebut it; but if the only appearance of the testator's name leaves it uncertain whether it was intended to authenticate the document as his will, affirmative evidence that that was his intention would be necessary for the will to be valid⁵.

1 Wills Act 1837 s 9(a) (s 9 substituted by the Administration of Justice Act 1982 s 17). The Wills Act 1837 s 9 (as substituted) does not apply to wills executed by an authorised person on behalf of a patient within the meaning of the Mental Health Act 1983: s 97(2)(a). As to the execution of the wills of patients under the Mental Health Act 1983 see ss 96(1)(e), 97; and MENTAL HEALTH vol 30(2) (Reissue) PARA 695. See also *Re Hughes* (1999) Times, 8 January (will valid despite being sealed by the court after the patient's death). As to the drafting of such wills see *Re D(J)* [1982] Ch 237, [1982] 2 All ER 37; *Re C (a patient)* [1991] 3 All ER 866; *Re S* [1997] 1 FLR 96. See also *Re Davey* [1980] 3 All ER 342, [1981] 1 WLR 164.

2 *Re Walker* (1862) 2 Sw & Tr 354; *Burke v Moore*, *Re Moore* (1875) IR 9 Eq 609.

3 Wills Act 1837 s 9(b) (as substituted: see note 1 supra). In the case of the wills of testators dying before 1 January 1983, similar provision was made by the Wills Act Amendment Act 1852 s 1 (repealed); but there was also a requirement that the signature be at or near the end of the will (see PARAS 356-357 post), such requirement having been abolished in respect of deaths on or after 1 January 1983.

4 *Wood v Smith* [1993] Ch 90 at 111, [1992] 3 All ER 556 at 561, CA, per Scott LJ. See also *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592; *Couser v Couser* [1996] 3 All ER 256 at 261, [1996] 1 WLR 1301 at 1306 (if a will on its face appears to be valid, and the testator's intention is clear, it is a heavy evidential burden on anyone who seeks to disturb that will and the principle that the maxim 'omnia praesumuntur rite et solemniter esse acta' (all things are presumed to be correctly and solemnly done) applies, and one should not search for defects in what occurred). As to the presumption of correctness see STATUTES vol 44(1) (Reissue) PARA 1440.

5 *Wood v Smith* [1993] Ch 90 at 111, [1992] 3 All ER 556 at 561, CA, per Scott LJ. See also PARA 354 text and note 12 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/354. Methods of signature.

354. Methods of signature.

A mark or initials¹ are sufficient if intended to represent a signature to a will², even if the testator's hand is guided in making it³, and whether the testator can write or not⁴, and an incompleted signature is sufficient where there is evidence that he intended it to be the best he could do by way of writing his name⁵. A stamped signature may be sufficient⁶, and sealing a will with a seal bearing the testator's initials has been held sufficient where the testator meant it to represent his signature⁷, although a mere sealing is not⁸. The signature must have been made with the purpose of authenticating the instrument⁹, and accordingly a signature intended merely to guard against other sheets being interpolated in a will is not sufficient¹⁰, nor is a signature made in execution of a previous will (the current document being the previous will with manuscript amendments made after it was originally executed)¹¹. The testator's name written by him at the beginning of a will in a phrase such as 'My will by (*name of testator*)', where the will was written out by him as a single operation and there was extrinsic evidence that he intended it to be his signature, can, however, be sufficient¹², as can the writing by the

testator of his name in the attestation clause¹³. Passing a dry pen over a signature already written is not a good signature of a will¹⁴, but it may amount to an acknowledgment of his signature by a testator¹⁵.

Signature in an erroneous or assumed name, if intended as the name of the testator, is sufficient¹⁶, as is a description which sufficiently identifies the testator and is intended to represent his name¹⁷. Where a testator puts his mark to a will in which he is wrongly named, the execution is valid¹⁸.

- 1 *Re Savory* (1851) 15 Jur 1042; *Re Holtam, Gillett v Rogers* (1913) 108 LT 732. A mark made by the testator's thumb smeared with ink was allowed in *Re Finn* (1935) 105 LJP 36 and conceded to be sufficient in *Borman v LeI* [2001] All ER (D) 94 (Jun), [2002] WTLR 237. A mark of any shape, not necessarily a cross, is sufficient: *Re Kieran* [1933] IR 222.
- 2 *Re Bryce* (1839) 2 Curt 325; *Re Clarke* (1858) 1 Sw & Tr 22; *Hindmarsh v Charlton* (1861) 8 HL Cas 160; *Re Blewitt* (1880) 5 PD 116; *Re Emerson* (1882) 9 LR Ir 443; *Re Kieran* [1933] IR 222.
- 3 *Wilson v Beddard* (1841) 12 Sim 28; *Fulton v Kee* [1961] NI 1.
- 4 *Baker v Dening* (1838) 8 Ad & El 94 (decided on the Statute of Frauds (1677)); *Re Bryce* (1839) 2 Curt 325.
- 5 *Re Chalcraft, Chalcraft v Giles* [1948] P 222, [1948] 1 All ER 700; cf *Re Maddock* (1874) LR 3 P & D 169 (incomplete signature of attesting witness).
- 6 *Jenkins v Gaisford and Thring, Re Jenkins* (1863) 3 Sw & Tr 93.
- 7 *Re Emerson* (1882) 9 LR Ir 443.
- 8 *Smith v Evans* (1751) 1 Wils 313; *Grayson v Atkinson* (1752) 2 Ves Sen 454 at 459; *Ellis v Smith* (1754) 1 Ves 11 at 13, 15; *Wright v Wakeford* (1811) 17 Ves 454 at 459 (overruling *Lemayne v Stanley* (1681) 3 Lev 1).
- 9 See PARA 353 text and notes 3-4 ante.
- 10 *Ewen v Franklin* (1855) Dea & Sw 7; *Re Dilkes* (1874) LR 3 P & D 164; *Phipps v Hale* (1874) LR 3 P & D 166. See also *Sweetland v Sweetland* (1865) 4 Sw & Tr 6.
- 11 *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1 (disapproving *Re Dewell's Goods* (1853) 1 Ecc & Ad 103).
- 12 *Wood v Smith* [1993] Ch 90, [1992] 3 All ER 556, CA.
- 13 *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592 (following the cases on signatures in attestation clauses cited in PARA 356 note 6 post).
- 14 *Playne v Scriven* (1849) 1 Rob Eccl 772; *Kevil v Lynch* (1874) IR 9 Eq 249.
- 15 *Playne v Scriven* (1849) 1 Rob Eccl 772; *Lewis v Lewis* [1908] P 1 at 5.
- 16 *Re Glover* (1847) 5 Notes of Cases 553; *Re Redding* (1850) 2 Rob Eccl 339; *Re Clarke* (1858) 1 Sw & Tr 22.
- 17 *Re Cook, Murison v Cook* [1960] 1 All ER 689, [1960] 1 WLR 353 ('Your loving mother').
- 18 *Re Douce* (1862) 2 Sw & Tr 593.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/355. Signature on behalf of the testator.

355. Signature on behalf of the testator.

A will may be signed on behalf of the testator, but the signature must be made in his presence and by his direction¹. The person so signing may be one of the attesting witnesses², and a signature of that person's own name expressly on behalf of the testator is sufficient³. The direction to sign may be implied from the conduct of the deceased and from the accompanying circumstances⁴, but the testator must in some way indicate to the two witnesses present that the signature was put there at his request⁵.

1 Wills Act 1837 s 9(a) (substituted by the Administration of Justice Act 1982 s 17). As to wills executed on behalf of patients pursuant to the mental health jurisdiction see PARA 353 note 1 ante.

2 *Re Bailey* (1838) 1 Curt 914; *Smith v Harris* (1845) 1 Rob Eccl 262; *Jenkyns v Gaisford and Thring* (1863) 11 WR 854 (where a facsimile stamp of the testator's name was used).

3 *Re Clark* (1839) 2 Curt 239; *Smith v Harris* (1845) 1 Rob Eccl 262; *Re McLoughlin* [1936] IR 223.

4 *Parker v Parker* (1841) Milw 541.

5 *Re Marshall* (1866) 13 LT 643.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/356. Position of signature; death before 1983.

356. Position of signature; death before 1983.

The will of a testator who died before 1 January 1983¹, as far as regards the position of the signature of the testator or of the person signing for him², is deemed valid if the signature is placed at³ or after, or following⁴ or under, or beside⁵, or opposite to the end of the will, so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will⁶. The validity of the will is not affected by the fact that the signature does not immediately follow the end of the will⁷, or that a blank space intervenes between the end of the will and the testator's signature⁸, or that the signature is on a page or side containing no clause, PARAGRAPH or disposing part of the will⁹, or that there is sufficient space in the preceding page to contain the signature¹⁰. No signature is operative, however, to give effect to any disposition which is underneath or which follows it¹¹, or to any disposition or direction inserted after the signature has been made¹².

1 The date on which the substitution of the Wills Act 1837 s 9 by the Administration of Justice Act 1982 s 17 came into operation: see s 76(11). The Wills Act 1837 s 9 (as substituted) makes no provision as to the position of the signature: see PARA 358 post. Nothing in the Administration of Justice Act 1982 s 17 affects the will of a testator who died before 1 January 1983: s 73(6)(a).

2 As to a will signed for a patient pursuant to an authorisation of the judge under the mental health jurisdiction see PARA 353 note 1 ante.

3 *Re Woodley* (1864) 3 Sw & Tr 429 (signature across last two lines). The name of the testator written as the last word of a holograph will may be a signature: *Trott v Skidmore* (1860) 2 Sw & Tr 12; *Lewis v Lewis* [1908] P 1. A signature or mark in the middle of a will is not sufficient: *Margary v Robinson* (1886) 12 PD 8.

4 *Re Wright* (1865) 4 Sw & Tr 35 (signature across third page of a sheet of notepaper); *Re O'Neill* (1916) 50 ILT 180 (signature of testator below those of the witnesses).

5 *Re Jones* (1865) 4 Sw & Tr 1 (signature at side of attestation clause); *Re Williams* (1865) LR 1 P & D 4 (signature opposite last words of will); *Re Coombs* (1866) LR 1 P & D 302; *Re Ainsworth* (1870) LR 2 P & D 151; *Re Stoakes* (1874) 31 LT 552; *Re Osborne* (1909) 25 TLR 519; *Re Roberts* [1934] P 102 (signature in margin). See, however, *Re Hughes* (1887) 12 PD 107 (where a codicil was executed by a signature in the margin of the

will in the mistaken belief that the codicil constituted an alteration of the will, and probate of the codicil was refused).

6 See the Wills Act 1837 s 9 (as originally enacted); and the Wills Act Amendment Act 1852 s 1 (repealed). A signature has been held to be valid where it was placed in the testimonium clause (*Re Mann* (1858) 28 LJP & M 19; *Re Torre* (1862) 8 Jur NS 494); the attestation clause (*Re Walker* (1862) 2 Sw & Tr 354; *Re Huckvale* (1867) LR 1 P & D 375; *Re Casmore* (1869) LR 1 P & D 653; *Re Pearn* (1875) 1 PD 70; *Re Moore* [1901] P 44); following or after or under the clause of attestation (*Re Standley* (1849) 7 Notes of Cases 69), either with or without a blank space intervening; following or after or under or beside the names or one of the names of the attesting witnesses (see *Re Jones* (1865) 4 Sw & Tr 1; *Re Puddephatt* (1870) LR 2 P & D 97 (beneath); *Re Horsford* (1874) LR 3 P & D 211 (following page); *Byles v Cox* (1896) 74 LT 222); and in a box-like space deliberately reserved for the signature but placed among the dispositive words (*Re Hornby* [1946] P 171, [1946] 2 All ER 150). Cf *Re Harris, Murray v Everard* [1952] P 319, [1952] 2 All ER 409 (where the signature was written at the top and towards the right-hand side of the will under the words 'My last will and testament', and probate was refused).

7 *Page v Donovan and Hankey* (1857) 3 Jur NS 220 (where a notarial certificate intervened).

8 *Re Fuller* [1892] P 377; *Re Williams* (1865) LR 1 P & D 4; *Re Little, Foster v Cooper* [1960] 1 All ER 387, [1960] 1 WLR 495.

9 *Re Williams* (1865) LR 1 P & D 4; *Hunt v Hunt* (1866) LR 1 P & D 209.

10 *Re Williams* (1865) LR 1 P & D 4; *Hunt v Hunt* (1866) LR 1 P & D 209; *Re Archer* (1871) LR 2 P & D 252.

11 *Re Greata* (1856) 2 Jur NS 1172; *Re Dallow* (1866) LR 1 P & D 189; *Re Woods* (1868) LR 1 P & D 556; *Re White* [1896] 1 IR 269; *Re Evans* (1923) 128 LT 669. See also *Re Beadle, Mayes v Beadle* [1974] 1 All ER 493, [1974] 1 WLR 417 (where it was held that a signature on an envelope containing an insufficiently executed will merely identified the document enclosed in it).

12 *Re Arthur* (1871) LR 2 P & D 273; *Re Little, Foster v Cooper* [1960] 1 All ER 387, [1960] 1 WLR 495.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/357. Signature constructively at end of will; death before 1983.

357. Signature constructively at end of will; death before 1983.

In relation to the will of a testator dying before 1 January 1983¹, words which are physically beneath, either wholly or partially, or which follow the signature may be considered to be above it either by reason of the mode of writing² or by reason of the use of asterisks or other signs of interpolation³. A list of legacies written at the same time as the will which contained words of bequest followed by a blank was admitted to probate on the basis of constructive interpolation⁴. Where the court is satisfied that such a testator's signature really follows the dispositive part of a testamentary paper, although it may occupy a place on the paper literally above or on a page preceding the dispositive part, that part may be admitted to probate⁵. The mere fact that the executed part of the will terminates with an incomplete sentence continued overleaf is not, however, sufficient to justify the admission to probate of the words following the signature⁶.

1 As to the significance of this date see PARA 356 note 1 ante.

2 *Re Kimpton* (1864) 3 Sw & Tr 427; *Re Ainsworth* (1870) LR 2 P & D 151; *Re Wilkinson* (1881) 6 PD 100.

3 *Re Birt* (1871) LR 2 P & D 214; *Re Greenwood* [1892] P 7. Cf *Re White* (1860) 6 Jur NS 808. See also *Oldroyd v Harvey* [1907] P 326; *Palin v Ponting* [1930] P 185.

4 *Re Saxton, Barclays Bank Ltd v Treasury Solicitor* [1939] 2 All ER 418.

5 *Re Long* [1936] P 166 at 173, [1936] 1 All ER 435 at 440. Thus in a will on a printed or lithographed form, where the signatures of the testator and the witnesses are on the place provided for them on the first page and

the dispositions follow on later pages, the will has been held to be duly executed: *Re Wotton* (1874) LR 3 P & D 159; *Re Gilbert* (1898) 78 LT 762; *Re Stalman, Stalman v Jones* [1931] WN 143, CA; *Re Smith* [1931] P 225; *Re Long* supra at 172-173 and 439-440 (explaining *Royle v Harris* [1895] P 163). See also *Re Staniforth, Gilbert v Heining* (1965) 109 Sol Jo 112. In *Re Martin's Goods* [1928] NI 138, where the signatures were on the second page of the will following certain dispositions, *Re Gilbert* supra was dissented from, and the third page of the will, with further dispositions, was not admitted to probate. See also *Re Davis* (1843) 3 Curt 748; *Re Topham* (1849) 14 Jur 514; *Millward v Buswell* (1904) 20 TLR 714. In such a case no part of the will is admitted to probate if the signature is made for identification purposes only: *Sweetland v Sweetland* (1865) 4 Sw & Tr 6. See also PARA 353 ante.

6 *Re Gee* (1898) 78 LT 843; *Practice Direction* [1953] 1 WLR 689. In such a case probate may be granted of that part of the will which precedes the signature: *Re Anstee* [1893] P 283. In *Re White* [1896] 1 IR 269, the appointment of executors followed the signature and attestation clause and probate was refused of the added words, although expressed by the testator to be written prior to execution of the will.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/358. Position of signature; death after 1982.

358. Position of signature; death after 1982.

In relation to the wills of testators who die on or after 1 January 1983, there is no requirement that the testator's signature should be at the end of the will¹. The only requirement is that it should appear that the testator intended by his signature to give effect to the will².

1 See the Wills Act 1837 s 9 (substituted, as from 1 January 1983, by the Administration of Justice Act 1982 s 17). For the former rules relating to the position of the signature of a will see the Wills Act 1837 s 9 (as originally enacted); and PARAS 356-357 ante.

2 Ibid s 9(b) (as substituted: see note 1 supra). See also PARAS 353-354 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/359. Will on several sheets.

359. Will on several sheets.

Where a will consists of several sheets, it is not necessary for the testator to sign all of them, so long as at the time of execution all the sheets are attached in some way¹, even though not necessarily mechanically². Where witnesses saw only the last sheet of the will, it may be presumed that the whole of the will was in the room³. Where several sheets constituting a connected disposal of property are found together, the presumption is that they all formed the will of the deceased⁴ and that any apparent alteration in their order was made before execution⁵. Probate may be granted of a signed but unattested will enclosed in an envelope both signed by the testator and attested⁶, and of a will, attested, but not signed by the testator, enclosed in an envelope signed by him⁷.

Declarations by the testator made both before and after execution are admissible to show what were the constituent parts of the will⁸.

1 *Lewis v Lewis* [1908] P 1 at 5 per Bagnall J. See also *Cook v Lambert* (1863) 3 Sw & Tr 46; *Re West* (1863) 9 Jur NS 1158; *Re Horsford* (1874) LR 3 P & D 211.

- 2 *Gregory v Queen's Proctor* (1846) 4 Notes of Cases 620 at 639; *Re Little, Foster v Cooper* [1960] 1 All ER 387, [1960] 1 WLR 495 (sheets pressed together on a table by testator).
- 3 *Bond v Seawell* (1765) 3 Burr 1773.
- 4 *Marsh v Marsh* (1860) 1 Sw & Tr 528; *Re O'Brien* [1900] P 208; but see *Re M'Key* (1876) IR 11 Eq 220 (where the evidence was insufficient).
- 5 *Rees v Rees* (1873) LR 3 P & D 84. In *Re Madden* [1905] 2 IR 612, where the sheets were pinned together and the sheet containing the testator's signature and attestation clause came first, the court concluded that that sheet had inadvertently been misplaced either before or after the will was signed, but that at all events the sheet containing the signature was written last.
- 6 *Re Almosnino* (1859) 29 LJP & M 46; *Re Nicholls, Hunter v Nicholls* [1921] 2 Ch 11.
- 7 *Re Mann* [1942] P 146, [1942] 2 All ER 193. Where, however, there is no evidence of testamentary intention and the signature on the envelope is merely for identification of its contents, there is no valid will: *Re Bean* [1944] P 83, [1944] 2 All ER 348; *Re Beadle, Mayes v Beadle* [1974] 1 All ER 493, [1974] 1 WLR 417.
- 8 *Gould v Lakes* (1880) 6 PD 1; *Re Hutchison* (1902) 18 TLR 706.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/360. Acknowledgment of signature.

360. Acknowledgment of signature.

A testator must either sign his will or acknowledge his signature in the presence of two or more witnesses present at the same time¹. It is not necessary for the testator to say, 'This is my signature'; acknowledgment may be by gesture², it may be made in answer to a question³, and production of a will with a signature on it and a request that it be witnessed may be sufficient⁴. The witnesses must, however, see, or have an opportunity of seeing, the signature of the testator⁵, and, if what takes place involves an acknowledgment by the testator that the signature is his, that is enough⁶. The signature to be acknowledged may be made either by the testator or by another for him⁷, but it must have been intended, at the time when it was made, to authenticate the will in question; thus, on a re-execution of a will with amendments made to it after it was originally executed, acknowledgment of the original signature is not sufficient⁸.

In the absence of proof that the witnesses did not see, or could not have seen, the signature of the testator, and in the absence of fraud, the courts presume, where there is a proper attestation clause, or where the evidence shows that the testator knew the law, that the attesting witnesses saw the acknowledged signature⁹. Even where the attestation clause is informal, the presumption of due execution is applied if the attesting witnesses identify their signatures and that of the testator, even though they have no recollection of the circumstances in which the will was executed¹⁰.

1 Wills Act 1837 s 9(c) (substituted by the Administration of Justice Act 1982 s 17). As to a will signed for a patient pursuant to an authorisation of the judge under the mental health jurisdiction see PARA 353 note 1 ante.

2 *Re Davies* (1850) 2 Rob Eccl 337; but see *Re Owston* (1862) 2 Sw & Tr 461 (where the testator was deaf and dumb).

3 *Kelly v Keatinge* (1871) IR 5 Eq 174.

4 See PARA 361 text and notes 1-2 post.

5 *Re Harrison* (1841) 2 Curt 863; *Re Claridge* (1879) 39 LT 612; *Re Gunstan, Blake v Blake* (1882) 7 PD 102, CA (following *Hudson v Parker* (1844) 1 Rob Eccl 14; and dissenting from *Gwillim v Gwillim* (1859) 3 Sw & Tr 200 and *Beckett v Howe* (1869) LR 2 P & D 1); *O'Meagher v O'Meagher* (1883) 11 LR Ir 117; *Clerly v Barry* (1887) 21

LR Ir 152 at 164, Ir CA; *Pascoe v Smart* (1901) 17 TLR 595; *Couser v Couser* [1996] 3 All ER 256, [1996] 1 WLR 1301; *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] All ER (D) 359 (Mar), [2005] WTLR 587. See also PARA 362 post. As to the incapacity of a blind person to witness a will see PARA 370 post.

6 *Daintree v Butcher and Fasulo* (1888) 13 PD 102, CA; *Re Hadler, Goodall v Hadler* (1960) Times, 20 October; *Re Staniforth, Gilbert v Heining* (1965) 109 Sol Jo 112. See also *Gillic v Smyth* (1914) 49 ILT 36; *Re White, Barker v Gribble* [1991] Ch 1 at 10, [1990] 3 All ER 1 at 7.

7 *Re Regan* (1838) 1 Curt 908; *Parker v Parker* (1841) Milw 541. A signature pencilled by a third person to show the place of signature cannot, however, be acknowledged: *Reeves v Grainger* (1908) 52 Sol Jo 355. See also PARA 355 ante.

8 *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1 (disapproving *Re Dewell* (1853) 17 Jur 1130). See also *Wood v Smith* [1993] Ch 90, [1992] 3 All ER 556, CA; cf *Re Pattison, Henderson v Priestman* [1918] 2 IR 90 (where a testatrix signed without attesting witnesses, and subsequently signed in the presence of attesting witnesses, but the witnesses signed before her second signature was made; the execution was held valid as an acknowledgment of the earlier signature, but no amendment had been made to the will after the earlier signature).

9 *Wright v Sanderson* (1884) 9 PD 149, CA; *Whiting v Turner* (1903) 89 LT 71; *Kavanagh v Fegan* [1932] IR 566; *Re McLean, Lockhart v McLean* [1950] IR 180; *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] All ER (D) 359 (Mar), [2005] WTLR 587. See also *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592.

10 *Woodhouse v Balfour* (1887) 13 PD 2; *Re Rees* (1865) 34 LJP & A 56. As to the presumption of due execution see PARA 369 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/C. SIGNATURE/361. Presumption that will was already signed.

361. Presumption that will was already signed.

The production of a will by a testator with his signature on it, and a request by him, or by someone acting for him in his presence¹, to the witnesses to attest it, is a sufficient acknowledgment of the signature², and the court is not bound to have positive affirmative evidence from the attesting witnesses that the testator's name was signed to the paper before they signed it³. The mere circumstance of calling in witnesses who had no opportunity of seeing the testator's signature, without giving them any explanation of the instrument which they are signing, does not, however, amount to an acknowledgment of the signature by a testator⁴, especially when there is no evidence that the testator's signature was on the will at the time⁵.

1 *Faulds v Jackson* (1845) 6 Notes of Cases, Supp i; *Inglesant v Inglesant* (1874) LR 3 P & D 172; *Re Bishop* (1882) 30 WR 567; *Kavanagh v Fegan* [1932] IR 566; *Cooke v Henry* [1932] IR 574; but see *Morritt v Douglas* (1872) LR 3 P & D 1.

2 le for the purpose of the Wills Act 1837 s 9(c) (as substituted): see PARA 360 ante. See *Gaze v Gaze* (1843) 3 Curt 451; *Keigwin v Keigwin* (1843) 3 Curt 607; *Re Davis* (1843) 3 Curt 748; *Re Dewell* (1853) 17 Jur 1130 (disapproved on another point in *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1: see PARA 354 text and note 11 ante); *Re Claridge* (1879) 39 LT 612; *Re Pattison, Henderson v Priestman* [1918] 2 IR 90; *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592; *Couser v Couser* [1996] 3 All ER 256, [1996] 1 WLR 1301; *Re White, Barker v Gribble* supra at 10 and 7.

3 *Blake v Knight* (1843) 3 Curt 547. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 304.

4 *Ilott v Genge* (1842) 3 Curt 160 (affd (1844) 4 Moo PCC 265); *Fischer v Popham* (1875) LR 3 P & D 246; *Wright v Sanderson* (1884) 9 PD 149, CA.

5 *Re Swinford* (1869) LR 1 P & D 630; *Pearson v Pearson* (1871) LR 2 P & D 451.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/362. Requirements for attestation.

D. ATTESTATION

362. Requirements for attestation.

The testator's signature must be made or acknowledged by him in the presence of two¹ or more witnesses present at the same time². Each witness must then either attest and sign the will or acknowledge his signature³, in the testator's presence. The testator's complete⁴ signature must be made or acknowledged when both the attesting witnesses are actually present at the same time⁵, and each witness must attest and sign, or acknowledge, his signature after the testator's signature has been so made or acknowledged⁶. Although it is not essential for the attesting witnesses to sign in the presence of each other⁷, it is usual for them to do so. Each witness should be able to say with truth that he knew that the testator had signed the document⁸ but it is not necessary that the witness should know that it is the testator's will⁹. There is, however, no sufficient acknowledgment unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his will or that his signature is inside the will¹⁰.

1 As to superfluous attestation see PARA 346 ante.

2 Wills Act 1837 s 9(c) (substituted by the Administration of Justice Act 1982 s 17). The Wills Act 1837 s 9(c) (as substituted) is in the same terms in this respect as the original enactment. Every will duly executed in the manner required by s 9 (as substituted) is valid without any other publication thereof: s 13. 'Publication' is an obsolete procedure whereby the testator made a declaration in the presence of witnesses that the instrument produced to them was his will. This procedure has been superseded by attestation by two witnesses: see s 9(d) (as substituted); and the text to note 3 infra.

3 Ibid s 9(d) (substituted by the Administration of Justice Act 1982 s 17). The Wills Act 1837 s 9(d) (as substituted) has effect in relation to wills of persons dying on or after 1 January 1983. See also PARA 367 post. Under s 9 (as originally enacted), applying to the wills of persons who died before 1 January 1983, the witnesses were required to attest and sign after the testator signed or acknowledged his signature in their presence, and did not have the alternative of acknowledging their signatures after this had happened. As to wills executed on behalf of patients pursuant to the judge's authorisation under the mental health jurisdiction see PARA 353 note 1 ante. For a case where the witnesses had not signed in the presence of the testator see *Betts v Gannell* (1903) 19 TLR 304. As to the law in Scotland see *Whitworth v Walker* (1915) 32 TLR 195, HL. In an undefended probate action the court allowed the execution of the will to be proved by a person present although not an attesting witness: *Mackay v Rawlinson* (1919) 35 TLR 223. A will duly executed and attested will effect a valid execution of a power of appointment: see POWERS vol 36(2) (Reissue) PARA 297.

4 See *Re Colling, Lawson v von Winckler* [1972] 3 All ER 729, [1972] 1 WLR 1440 (where one witness was called away in the middle of the testator's signing, so that the full signature was not witnessed; the first witness came back, and the testator and the other witness both acknowledged their signatures in the presence of each other and the first witness, after which the latter signed the will; the attestation was held to be invalid, but, had the will been executed on or after 1 January 1983, it would have been valid (see note 3 supra)).

5 *Wyatt v Berry* [1893] P 5; *Rolleston v Sinclair* [1924] 2 IR 157, Ir CA.

6 *Moore v King* (1842) 3 Curt 243; *Cooper v Bockett* (1843) 3 Curt 648; *Pennant v Kingscote* (1843) 3 Curt 642 at 647; *Hindmarsh v Charlton* (1861) 8 HL Cas 160; *Wyatt v Berry* [1893] P 5; *Brown v Skirrow* [1902] P 3 at 7; *Re Davies, Russell v Delaney* [1951] 1 All ER 920; *Re Colling, Lawson v von Winckler* [1972] 3 All ER 729, [1972] 1 WLR 1440. These decisions must, however, be read in light of the fact that, since they were decided, it has become permissible for a witness to acknowledge his signature after the testator signs or acknowledges his in the presence of both witnesses: see note 3 supra.

7 Wills Act 1837 s 9(d) (as substituted: see note 3 supra). Section 9(d) (as substituted) confirmed the law on this point in existence prior to 1 January 1983: see *Faulds v Jackson* (1845) 6 Notes of Cases, Supp i, PC; *Re Webb* (1855) Dea & Sw 1 (disapproving the dictum to the contrary in *Casement v Fulton* (1845) 5 Moo PCC 130

at 140); *Sullivan v Sullivan* (1879) 3 LR Ir 299 (followed in *O'Meagher v O'Meagher* (1883) 11 LR Ir 117 and *Re Smythe* (1915) 49 ILT 223); *Brown v Skirrow* [1902] P 3 at 5.

8 *Brown v Skirrow* [1902] P 3 at 5. See also *Casson v Dade* (1781) 1 Bro CC 99; *Couser v Couser* [1996] 3 All ER 256, [1996] 1 WLR 1301; *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] All ER (D) 359 (Mar), [2005] WTLR 587.

9 *Re Benjamin* (1934) 150 LT 417; *Re Gibson* [1949] P 434, [1949] 2 All ER 90. As to the capacity of a blind person to witness a will see PARA 370 post.

10 *Re Gunstan, Blake v Blake* (1882) 7 PD 102, CA (following *Hudson v Parker* (1844) 1 Rob Eccl 14; and dissenting from *Beckett v Howe* (1869) LR 2 P & D 1 and *Gwillim v Gwillim* (1859) 3 Sw & Tr 200); *Daintree v Butcher and Fasulo* (1888) 13 PD 102 at 104 per Cotton J; *Re Swift* (1900) 17 TLR 16; *Re Groffman, Groffman and Block v Groffman* [1969] 2 All ER 108, [1969] 1 WLR 733; *Couser v Couser* [1996] 3 All ER 256, [1996] 1 WLR 1301. As to acknowledgment of signature see PARA 360 ante.

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363. Attestation or acknowledgment in the testator's presence.

The attestation of a will by the witnesses takes place in the presence of the testator if he might have seen the witnesses sign, had he chosen to look; it is not necessary that he should actually see them sign¹. He must, however, be mentally capable of recognising the act which is being done, and conscious of the transaction in which the witnesses are engaged, and, if he becomes insensible before the witnesses sign, the attestation is insufficient². The rules for valid acknowledgment by a witness of his signature are the same as for valid acknowledgment by the testator of his signature³.

1 *Shires v Glascock* (1685) 2 Salk 688; *Davy v Smith* (1693) 3 Salk 395; *Longford v Eyre* (1721) 1 P Wms 740; *Casson v Dade* (1781) 1 Bro CC 99; *Todd v Earl of Winchelsea* (1826) Mood & M 12; *Re Newman* (1838) 1 Curt 914; *Re Ellis* (1840) 2 Curt 395; *Re Colman* (1842) 3 Curt 118; *Tribe v Tribe* (1849) 1 Rob Eccl 775 (testatrix unable to turn in bed to see attestation; will invalid); *Jenner v Finch* (1879) 5 PD 106; *Carter v Seaton* (1901) 85 LT 76 (testator could not have had witnesses in sight; will invalid).

2 *Right v Price* (1779) 1 Doug KB 241. See also *Re Chalcraft, Chalcraft v Giles* [1948] P 222, [1948] 1 All ER 700.

3 *Couser v Couser* [1996] 3 All ER 256, [1996] 1 WLR 1301 (witness validly acknowledged her own signature by protesting that the method of execution being adopted was not valid). As to acknowledgment of signature see PARA 360 ante.

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364. Form of attestation.

Although no form of attestation is necessary¹, it is always desirable to have an attestation clause showing that the statutory requirements have been complied with². In the absence of such a clause an affidavit of due execution must be obtained from one of the attesting witnesses, or from some person who can depose to the facts³, before probate can be obtained in the usual way on the executor's oath alone⁴.

1 See the Wills Act 1837 s 9 (substituted by the Administration of Justice Act 1982 s 17). The Wills Act 1837 s 9 (as substituted) is in the same terms in this respect as the original enactment. This provision means that no clause of attestation stating that the statutory requirements have been carried out need be appended to the will: *Bryan v White* (1850) 14 Jur 919. In *Mason v Bishop* (1883) Cab & El 21, a signature purporting to attest the signatures of the witnesses was held sufficient to attest the execution by the testator. An attestation clause is not strictly part of the testator's will: *Re Atkinson* (1883) 8 PD 165; distinguished in *Re Dowling* [1933] IR 150 (where, on extrinsic evidence, a devise in the attestation clause was admitted as part of the will).

2 See *Re Selby-Bigge* [1950] 1 All ER 1009. The shortest form of attestation clause acceptable to the probate registries is 'signed by the testator in our presence and then by us in his'. For a form of attestation clause where a blind testator signs by his mark see *Re Sellwood, Heynes v Sellwood* (1964) 108 Sol Jo 523.

3 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(1) (amended by SI 1991/1876); *Belbin v Skeats* (1858) 1 Sw & Tr 148; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 133, 303.

4 As to the presumption of due execution see PARA 369 post. As to the obtaining of probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 72 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/365. Position of attestation.

365. Position of attestation.

The attesting witnesses are not required to sign their names on any particular part of the will, so long as the signatures are clearly intended to attest the testator's signature¹ and it can be shown that their signatures were affixed at a time after any words in the will below their signatures had been written in². Where, however, the attestation is not on the same sheet of paper as the testator's signature, the attestation must be on a paper physically connected with that sheet³.

1 *Re Davis* (1843) 3 Curt 748; *Re Chamney* (1849) 1 Rob Eccl 757; *Roberts v Phillips* (1855) 4 E & B 450; *Re Braddock* (1876) 1 PD 433; *Re Streatley* [1891] P 172; *Re Fuller* [1892] P 377; *Re Ellison* [1907] 2 IR 480 (following *Re Streatley* supra).

2 *Re Jones* (1842) 1 Notes of Cases 396. See also *Byles v Cox* (1896) 74 LT 222.

3 *Re Braddock* (1876) 1 PD 433. As to a will written on several sheets see PARA 359 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/366. Methods of attestation.

366. Methods of attestation.

To make a valid attestation a witness must either write his name or make some mark¹ intended to represent his name². A will may be signed by marks, even though the witnesses are capable of writing³. The initials of an attesting witness may be sufficient⁴, unless placed on the will merely for the purpose of identifying alterations⁵.

1 *Harrison v Harrison* (1803) 8 Ves 185; *Addy v Grix* (1803) 8 Ves 504; *Re Ashmore* (1843) 3 Curt 756; *Clarke v Clarke* (1879) 5 LR Ir 47, Ir CA.

2 *Hindmarsh v Charlton* (1861) 8 HL Cas 160 at 169. In the case of testators dying on or after 1 January 1983 a witness may acknowledge his signature: see PARA 362 ante.

3 *Re Amiss* (1849) 2 Rob Eccl 116.

4 *Re Christian* (1849) 2 Rob Eccl 110; *Re Blewitt* (1880) 5 PD 116.

5 *Re Martin* (1849) 1 Rob Eccl 712, 714; *Re Cunningham* (1860) 4 Sw & Tr 194; *Re Shearn* (1880) 50 LJP 15. See also *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1. Attesting alterations rather than the will as a whole can, however, be valid if the Wills Act 1837 s 21 is complied with: see PARA 376 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/367. Description of witness.

367. Description of witness.

A witness may sign a will in any mode which sufficiently identifies him as the person attesting the will¹. Thus a sufficient description of the witness without his name is a valid description², and so is a signature in a wrong name³, where the signature is intended to represent the person signing and not some other person as being the actual witness⁴. Signing part of his name by a witness is not sufficient unless the part signed was intended to be a complete signature⁵. Formerly, a mere acknowledgment of an existing signature, as by passing a dry pen over it⁶, was also insufficient⁷, but, in the case of the will of a testator who dies on or after 1 January 1983, a witness may acknowledge his signature⁸. The pen may be guided for a witness unable to write⁹.

1 *Re Sperling* (1863) 3 Sw & Tr 272 (followed in *Re Cook, Murison v Cook* [1960] 1 All ER 689, [1960] 1 WLR 353, which concerned the testator's signature: see PARA 354 note 17 ante); *Re Eynon* (1873) LR 3 P & D 92.

2 *Re Sperling* (1863) 3 Sw & Tr 272 ('servant to' the testator, without any name).

3 *Re Olliver* (1854) 2 Ecc & Ad 57.

4 *Pryor v Pryor* (1860) 29 LJPM & A 114; *Re Leverington* (1886) 11 PD 80. Thus neither a husband (*Re White* (1843) 2 Notes of Cases 461) nor a wife (*Re Duggins* (1870) 39 LJP & M 24; *Pryor v Pryor* supra; *Re Leverington* supra; *Re Cope* (1850) 2 Rob Eccl 335) may sign on behalf of the other in the other's name.

5 *Re Maddock* (1874) LR 3 P & D 169.

6 *Re Maddock* (1874) LR 3 P & D 169. See also *Re Cunningham* (1860) 29 LJPM & A 71.

7 *Hindmarsh v Charlton* (1861) 8 HL Cas 160 at 169; *Horne v Featherstone* (1895) 73 LT 32. See also *Playne v Scriven* (1849) 1 Rob Eccl 772. The addition of the date (*Hindmarsh v Charlton* supra), or of the witness's address (*Re Trevanion* (1850) 2 Rob Eccl 311), or the correction of a letter in the existing signature (*Hindmarsh v Charlton* supra; *Re Maddock* (1874) LR 3 P & D 169), merely constituted acknowledgments of the existing signature.

8 See PARA 362 ante.

9 *Re Lewis* (1861) 7 Jur NS 688. See also *Harrison v Elvin* (1842) 3 QB 117; *Re Firth* (1858) 4 Jur NS 288.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/368. Intention to attest.

368. Intention to attest.

The court must be satisfied that the names of the witnesses were signed on the will for the purpose of attesting the testator's signature¹. When the court is satisfied that a signature has been added without any intention to attest the execution, it excludes the signature from the probate (or refuses probate if that leaves the will with insufficient witnesses)².

1 *Re Wilson* (1866) LR 1 P & D 269; *Re Sharman* (1869) LR 1 P & D 661; *Griffiths v Griffiths* (1871) LR 2 P & D 300; *Re Braddock* (1876) 1 PD 433; *Re Streatley* [1891] P 172; *Re Bercovitz, Canning v Enever* [1962] 1 All ER 552, [1962] 1 WLR 321, CA (where the wrong signature was attested). As to the position of attestation see PARA 365 ante. Where a will is amended after it has been executed, re-execution and attestation of the amendments will be sufficient if the Wills Act 1837 s 21 (see PARA 376 post) is complied with; but, where s 21 does not apply, it is necessary that the witnesses should intend to attest the entire will, not just the amendments: see *Re Martin* (1849) 1 Rob Eccl 712, 714; *Re Shearn* (1880) 29 WR 445; *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1.

2 *Re Sharman* (1869) LR 1 P & D 661; followed in *Re Purssglove* (1872) 26 LT 405 and *Re Murphy* (1873) IR 8 Eq 300. Cf *Mason v Bishop* (1883) Cab & El 21 (where, although the form of attestation was wrong, the testator's signature was in fact attested). As to superfluous attestation see PARA 346 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/369. Presumption of due execution.

369. Presumption of due execution.

There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will, but this presumption may be rebutted by evidence of the attesting witnesses¹ or otherwise². Where, however, the testator's mental capacity is in question, the evidence of a witness impeaching the will, inasmuch as he is thereby impeaching his own act, is viewed with extreme caution³, and is not generally accepted without corroboration⁴. Where there is no attestation clause, the presumption of due execution may be applied, usually where no evidence can be produced as to the circumstances of the signing and attestation⁵.

The burden of proving due execution, whether by presumption or by positive evidence, rests on the person setting up the will⁶.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 304. Clear evidence is needed to rebut the presumption; and the presumption of due execution will still be applied where the evidence shows that the will might not have been duly executed but does not demonstrate that it was not: see *Weatherhill v Pearce* [1995] 2 All ER 492, [1995] 1 WLR 592; *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Blind* [1999] All ER (D) 81, sub nom *Re Chapman* (1998-99) 1 ITELR 863; *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] All ER (D) 359 (Mar), [2005] WTLR 587.

2 *Re Parslow, Parslow v Parslow* (1959) Times, 3 December (evidence of handwriting expert that attestation was forged by testatrix).

3 *Bootle v Blundell* (1815) 19 Ves 494 at 504; *Howard v Braithwaite* (1812) 1 Ves & B 202 at 208.

4 *Kinleside v Harrison* (1818) 2 Phillim 449 at 499. Cf *Burrowes v Lock* (1805) 10 Ves 470 at 473; *Young and Smith v Richards* (1839) 2 Curt 371; *Pennant v Kingscote* (1843) 3 Curt 642. See also *Digg's Case* (circa 1680) cited in Skin at 79; *Hudson's Case* (1682) Skin 79.

5 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 305. In *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Blind* [1999] All ER (D) 81, sub nom *Re Chapman* (1998-99) 1 ITELR 863, the presumption was applied in the absence of an attestation clause, and where the

evidence of the surviving witness cast some doubt on the validity of the execution of the will, but not enough to rebut it.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 303.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(ii) Requisites for Formal Validity/D. ATTESTATION/370. Capacity of witnesses.

370. Capacity of witnesses.

There is no statutory provision which forbids any person from witnessing a will. A blind person, however, is not normally¹ capable of witnessing a will, as mere physical presence without the faculty of sight is not enough to constitute a person a witness to something visible, such as the signature of a will². A child possessing the requisite competence to give evidence³ is not incompetent to witness a will merely by reason of minority⁴, but no person under disability should act as witness to a will unless his mental capacity is such that he is conscious of the act done and unless he will, if required, be able to testify in support of the execution of the will⁵. A will is not invalid because at the time of the execution or at any time afterwards any person attesting the execution is incompetent⁶ to be admitted a witness to prove its execution⁷. Executors⁸, creditors and their wives or husbands⁹, and beneficiaries and their wives or husbands¹⁰, are all admissible witnesses to prove the execution of a will or its validity or invalidity, but a gift to a non-superfluous attesting witness or to the wife or husband of such a witness is void¹¹.

1 The possibility that a blind person might in very exceptional circumstances be able to witness a will was left open in *Re Gibson* [1949] P 434 at 437, 440, [1949] 2 All ER 90 at 92, 94.

2 *Re Gibson* [1949] P 434, [1949] 2 All ER 90 (citing dicta in *Hudson v Parker* (1844) 1 Rob Eccl 14 at 23, 35, 37, 40 and *Re Gunstan, Blake v Blake* (1882) 7 PD 102 at 107, 113, 116). For the rule that the witnesses must either have seen or had the opportunity of seeing the testator's signature see PARA 362 ante.

3 As to the competence of minors as witnesses see CIVIL PROCEDURE vol 11 (2009) PARA 966.

4 There is no statutory prohibition, but what is needed in a witness is his mental presence.

5 The object of the legislature was that the witnesses should see and be conscious of the act done and be able to prove it by their own evidence (see *Hudson v Parker* (1844) 1 Rob Eccl 14 at 23); and as to the meaning of 'attest' cf *Bryan v White* (1850) 2 Rob Eccl 315. From this principle the proposition in the text follows.

6 As to the competency of witnesses see CIVIL PROCEDURE vol 11 (2009) PARA 966 et seq.

7 Wills Act 1837 s 14. Probate in solemn form has been granted where neither attesting witness could be found: *Re Lemon, Winwood v Lemon* (1961) 105 Sol Jo 1107.

8 Wills Act 1837 s 17.

9 Ibid s 16. As from a day to be appointed, s 16 is amended so as to include civil partners: see the Civil Partnership Act 2004 s 71, Sch 4 para 4. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post). As to civil partnerships see PARAS 382, 470 post.

10 Wills Act 1837 s 15. As from a day to be appointed, s 15 and the Wills Act 1968 s 1 (see the text and note 11 infra) apply in relation to the attestation of a will by a person to whose civil partner there is given or made any such disposition as is described in the Wills Act 1837 s 15 (see PARA 343 ante) as they apply in relation to a person to whose spouse there is given or made any such disposition: Civil Partnership Act 2004 Sch 4 para 3. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 post).

11 See Wills Act 1837 s 15; and the Wills Act 1968 s 1. As from a day to be appointed, these provisions also apply to civil partners: see note 10 supra. See further PARAS 343-346 ante.

UPDATE**370 Capacity of witnesses**

NOTES 9-11--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(iii) Privileged Wills/371. Wills of soldiers, sailors and airmen.

(iii) Privileged Wills**371. Wills of soldiers, sailors and airmen.**

The will of a soldier¹ in actual military service, a mariner or seaman (including a member of the Royal Navy or marine forces) being either at sea or so circumstanced that, if he were a soldier, he would be in actual military service, or a member of the Royal Air Force similarly circumstanced, is not required to conform to the provisions of the Wills Act 1837², either as regards writing, or, if in writing, as regards execution, and is valid, even though the testator is under 18 years of age³.

'Actual military service' means active military service on the part of a person of either sex and of any rank concerned with operations in a war which is or has been in progress or is imminent⁴. It seems that the term is broader than the Roman conception of 'in expeditione', and is given a wider meaning⁵. It embraces operations against terrorists⁶, clandestine assassins and arsonists⁷. It is enough that the testator has taken some steps towards joining the forces in the field⁸, or that his battalion has been ordered to mobilise for active service⁹. Furthermore, a state of war is not essential; and, accordingly, a soldier ordered, before declaration of war, to rejoin his unit to take part in the defence of the realm against external danger is in actual military service¹⁰. The mere fact that a soldier is in barracks is, however, insufficient¹¹. It is not necessary that the service should be in the Queen's forces¹².

Any will so made may be revoked by the maker, notwithstanding that he is still under the age of 18, whether or not the circumstances are then such that he would be entitled to make a similar valid will¹³.

1 'Soldier' includes an officer (*Drummond v Parish* (1843) 3 Curt 522), and a civilian in actual military service (*Re Stanley* [1916] P 192).

2 As the will need not be attested, a gift to a witness is valid: see *Re Limond, Limond v Cunliffe* [1915] 2 Ch 240; cf para 346 ante. As to the normal requisites for validity see PARA 351 et seq ante.

3 See the Wills Act 1837 s 11; the Wills (Soldiers and Sailors) Act 1918 ss 1, 2, 5(2) (s 1 amended by the Family Law Reform Act 1969 s 3(1)); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 113. The Wills (Soldiers and Sailors) Act 1918 s 2, which enlarges the power of sailors to make privileged wills by putting them in the same position as soldiers, applies to a sailor who made his will before, but died after, 6 February 1918 (ie the date on which the Act was passed): *Re Yates* [1919] P 93. The Wills (Soldiers and Sailors) Act 1918 s 4 validated appointments of testamentary guardians by a will within the Wills Act 1837 s 11 (cf *Re Tollemache* [1917] P 246); but by virtue of the Children Act 1989 s 5(5), (13) an appointment of a guardian is now only valid if it is in writing, dated and signed (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 4, 148). A privileged will suffices to exercise a power of appointment: see POWERS vol 36(2) (Reissue) PARA 297.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 114.

- 5 See *Re Wingham, Andrews v Wingham* [1949] P 187, [1948] 2 All ER 908, CA.
- 6 *Re Anderson* (1958) 75 WNSW 334 (service in Malaya).
- 7 *Re Jones* [1981] Fam 7, [1981] 1 All ER 1 (service in Northern Ireland).
- 8 *Re Hiscock* [1901] P 78; *Stopford v Stopford* (1903) 19 TLR 185.
- 9 *Gattward v Knee* [1902] P 99; *Stopford v Stopford* (1903) 19 TLR 185; *Re Booth, Booth v Booth* [1926] P 118.
- 10 *Re Rippon* [1943] P 61, [1943] 1 All ER 676.
- 11 *White v Repton* (1844) 3 Curt 818; *Re Hill* (1845) 1 Rob Eccl 276.
- 12 *Re Donaldson* (1840) 2 Curt 386 (East India Company's private army).
- 13 Family Law Reform Act 1969 s 3(3), (4).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(iii) Privileged Wills/372. Wills of mariners and seamen.

372. Wills of mariners and seamen.

The privilege of a mariner or seaman of being able to make an informal will extends to officers of every rank, merchant seamen and marines, men or women¹. For the privilege to apply, it is not necessary that the will should be executed at sea, provided that it is made while on maritime service², and it can extend to a mariner or seaman serving on board a vessel permanently stationed in a harbour, or on service in a river³.

1 See the Wills Act 1837 s 11; the Wills (Soldiers and Sailors) Act 1918; para 371 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 115.

2 In the sense that the testator, at the time of making the will, is in post as a ship's officer, or is a member of a particular ship's company serving in that ship, including a member on shore leave or long leave ashore, or is employed by ship owners and having been discharged from one ship is already under orders to join another: see *Re Rapley's Estate, Rapley v Rapley* [1983] 3 All ER 248 at 251, [1983] 1 WLR 1069 at 1073. The unattested will of a seaman who was on leave, having been discharged from one ship and not posted to another, was held not to be valid: *Re Rapley's Estate, Rapley v Rapley* supra.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 115.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(5) PREPARATION AND EXECUTION/(iii) Privileged Wills/373. Form of will; revocation.

373. Form of will; revocation.

Any form of words, whether written or nuncupative, that is, spoken by the testator in the presence of a credible witness, will suffice to constitute a soldier's or sailor's or airman's will, provided that it is a deliberate expression of his wishes and is intended to have testamentary effect¹. The will, whether formal or informal, may be revoked by a letter or other informal act expressing an intention to revoke, without any new will, provided that the circumstances of the revocation are the same as are required to give validity to a soldier's or sailor's or airman's

will². A letter of a testator making erroneous statements as to what he thought that he had done with his estate, but showing no intention to alter his will, is not, however, effective to alter its dispositions³. The rule that the subsequent marriage of the testator revokes his will applies to a privileged will⁴. Return to life as a civilian does not of itself operate as revocation⁵. A privileged will is proved by affidavit showing that the testator, when he made it, was in actual military service or at sea, as the case may be, and that he was domiciled in England or Wales⁶.

1 See *Re Knibbs, Flay v Trueman* [1962] 2 All ER 829, [1962] 1 WLR 852 (words spoken in casual conversation were not testamentary act); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 116.

2 *Re Gossage, Wood v Gossage* [1921] P 194, CA. As to revocation generally see PARA 379 et seq post.

3 *Re Beech, Beech v Public Trustee* [1923] P 46, CA. See also *Godman v Godman* [1920] P 261, CA.

4 *Re Wardrop* [1917] P 54.

5 *Re Coleman* [1920] 2 IR 332.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 117.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(6) ALTERATIONS AND ERASURES/374. Due execution required.

(6) ALTERATIONS AND ERASURES

374. Due execution required.

No obliteration, interlineation or other alteration made in a will after execution is valid unless duly executed¹, except so far as the words or effect of the will before such alteration are not apparent². 'Apparent' means apparent on an inspection of the instrument, not apparent by extrinsic evidence³. Words are apparent if experts, using magnifying glasses where necessary, can decipher them and satisfy the court that they have done so⁴, but, where words are only readable by chemical means⁵, or by making a new document, such as an infra-red photograph⁶, they are not apparent, and, where there is complete obliteration of a whole legacy, so that the words used are no longer apparent, the obliteration effects a revocation of the legacy in question⁷. Revocation by obliteration may be conditional, and, if the condition in question is unfulfilled, the revocation fails and the will, as made before such revocation, remains operative⁸.

1 As to the form of execution of alterations see PARAS 376-378 post. The fact that a testamentary document contains erasures does not necessarily prevent it from being admitted to probate without an action: *Re O'Brien* [1900] P 208.

2 Wills Act 1837 s 21. As to revocation by obliteration of signatures see PARA 397 post.

3 *Townley v Watson* (1844) 3 Curt 761 at 764. See also *Re Ibbetson* (1839) 2 Curt 337; *Re McCabe* (1873) LR 3 P & D 94 at 96; *Re Horsford* (1874) LR 3 P & D 211; *Ffinch v Combe* [1894] P 191.

4 *Ffinch v Combe* [1894] P 191; *Re Brasier* [1899] P 36.

5 *Re Horsford* (1874) LR 3 P & D 211 at 215-216.

6 *Re Itter, Dedman v Godfrey* [1950] P 130, [1950] 1 All ER 68.

7 *Townley v Watson* (1844) 3 Curt 761. See *Re Hamer* (1943) 60 TLR 168 (where part of the words stating the sum given was obliterated and probate passed with the obliteration in blank).

8 As to dependent relative revocation see PARA 400 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(6) ALTERATIONS AND ERASURES/375. Time of alteration.

375. Time of alteration.

In the absence of evidence, the presumption is that alterations, interlineations and erasures were made after execution, and the burden is on the person who seeks to rely on an alteration in a will to adduce some evidence that the alteration was made before the will was executed¹. Probate is granted in blank as regards such of the original words as are not apparent², but, if they are apparent, the probate contains the original words³. Very slight affirmative evidence is, however, sufficient⁴, at least if the alterations are trifling⁵. Once probate has been granted, the court of construction must accept alterations as having been made before the will was executed⁶.

Evidence of declarations of testamentary intention made by the testator before or at the time of execution suffices to displace the above presumption⁷, and so does evidence of other persons that the alterations were made before execution⁸. Internal evidence furnished by the document itself may be considered, and the circumstance that a clause would be perfectly meaningless without the interlineation is material⁹. Any evidence which, having regard to the circumstances, reasonably leads to the conclusion that the alterations were made before execution is sufficient¹⁰. Thus where alterations are necessary to supply blanks left in a will, such as for the names of legatees or the amounts of legacies, and these blanks are afterwards filled in, the presumption is that they were inserted before execution, and an interlineation which appears to have been written with the same ink and the same pen as the rest of the will, and which supplies a blank in the sense, is presumed to have been written before execution¹¹.

Where the testator indicates, for example by asterisks, the place in the will where matter written before execution is intended to come in, such matter, if proved to be written before the will was executed, may be regarded as a valid interlineation¹². Words following the executed part of a will cannot, however, be treated as an interlineation merely because they complete an otherwise incomplete sentence in the executed part¹³.

1 *Cooper v Bockett* (1846) 4 Moo PCC 419; *Simmons v Rudall* (1851) 1 Sim NS 115 at 137; *Greville v Tylee* (1851) 7 Moo PCC 320; *Doe d Shallcross v Palmer* (1851) 16 QB 747; *Re James* (1858) 1 Sw & Tr 238; *Williams v Ashton* (1860) 1 John & H 115; *Re Benn* [1938] IR 313.

2 *Re Ibbetson* (1839) 2 Curt 337.

3 *Re Beavan* (1840) 2 Curt 369; *Re Martin* (1849) 1 Rob Eccl 712; *Re Gaussen* (1868) 16 WR 212.

4 *Re Duffy* (1871) IR 5 Eq 506.

5 See *Re Hindmarch* (1866) LR 1 P & D 307. Common form probate may be granted of a will including alterations, in the absence of evidence of when the alterations were made, if they appear to the district judge or registrar to be of no practical importance: see the Non-Contentious Probate Rules 1987, SI 1987/2024, r 14(2) (amended by SI 1991/1876); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 135.

6 *Gann v Gregory* (1854) 3 De GM & G 777 at 780; *Cowan v Ball* [1933] NI 173. If, however, an interested party objects to the inclusion of alterations in the probate, it may be possible to bring proceedings for revocation of the grant of probate.

7 *Re Sykes* (1873) LR 3 P & D 26 at 27. See also *Doe d Shallcross v Palmer* (1851) 16 QB 747; *Dench v Dench* (1877) 2 PD 60; *Re Oates, Callow v Sutton* [1946] 2 All ER 735. Declarations as to unattested alterations made after execution of the will are not admissible: *Re Jessop* [1924] P 221.

8 *Tyler v Merchant Taylors' Co* (1890) 15 PD 216; *Re Greenwood* [1892] P 7.

9 *Re Heath* [1892] P 253. See also *Re Cadge* (1868) LR 1 P & D 543; *Re Treeby* (1875) LR 3 P & D 242; *Doherty v Dwyer* (1890) 25 LR Ir 297 (where the attestation clause referred generally to a 'few erasures and alterations'). The mere fact that the alterations are dated earlier than the execution is not enough: *Re Adamson* (1875) LR 3 P & D 253.

10 *Moore v Moore* (1872) IR 6 Eq 166; *Re Tonge* (1891) 66 LT 60.

11 *Re Hindmarch* (1866) LR 1 P & D 307; *Re Cadge* (1868) LR 1 P & D 543; *Re Benn* [1938] IR 313. A clause inconsistent with the rest of the will, and struck out in pencil, was ignored in *Re Tonge* (1891) 66 LT 60. See also *Birch v Birch* (1848) 1 Rob Eccl 675.

12 *Re Birt* (1871) LR 2 P & D 214; *Re Greenwood* [1892] P 7. See also *Re White* (1860) 6 Jur NS 808; and PARA 357 ante.

13 *Re Anstee* [1893] P 283. See also *Re White* [1896] 1 IR 269; *Re Gee* (1898) 78 LT 843; and PARA 357 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(6) ALTERATIONS AND ERASURES/376. Valid alteration after signature.

376. Valid alteration after signature.

If an alteration (other than an obliteration¹) is made in a will after it is signed, the will must be signed again by the testator (and duly witnessed), and it is not sufficient for the testator to acknowledge his original signature²; the testator and the witnesses may sign in the margin or in some other part of the will opposite or near to the alteration or at the foot or end or opposite a memorandum referring to the alteration at the end of some other part of the will³. The initials of the testator and the witnesses are sufficient for this purpose⁴, but the initials of the witnesses alone are not⁵. The testator and witnesses do not, however, fulfil the statutory requirement by merely going over their signatures with a dry pen; there must be either an execution of the alteration or a re-execution of the will⁶.

1 ¹ ie an obliteration which renders the words no longer apparent: see PARA 374 ante.

2 ² *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1 (disapproving *Re Dewell* (1853) 17 Jur 1130).

3 ³ Wills Act 1837 s 21. More than one such alteration may be attested by a single marginal execution: see *Re Treeby* (1875) LR 3 P & D 242; *Re Wilkinson* (1881) 6 PD 100. The Wills Act 1837 s 21 enables alterations to have effect, even though it is the alterations rather than the altered will as a whole which are executed and attested. As to this distinction see *Re White, Barker v Gribble* [1991] Ch 1, [1990] 3 All ER 1.

4 ⁴ *Re Blewitt* (1880) 5 PD 116.

5 ⁵ *Re Cunningham* (1860) 4 Sw & Tr 194; *Re Shearn* (1880) 50 LJP 15.

6 ⁶ *Re Cunningham* (1860) 4 Sw & Tr 194. Execution of the alteration must conform with the Wills Act 1837 s 21 (see the text and note 3 supra), whilst re-execution of the will must conform with s 9 (as substituted) (see PARA 351 et seq ante).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(6) ALTERATIONS AND ERASURES/377. Effect of codicil on alterations.

377. Effect of codicil on alterations.

Unattested alterations in a will are validated by a subsequent codicil confirming the will¹, unless it appears from the codicil or otherwise that the alterations were merely deliberative², because a codicil is a republication of a will and validates it at the time of execution of the codicil³. If the codicil makes no mention of alterations, the presumption is that they were made after the date of the codicil, but this may be rebutted by evidence⁴.

1 *Re Heath* [1892] P 253; *Tyler v Merchant Taylors' Co* (1890) 15 PD 216; *Re Hay, Kerr v Stinnear* [1904] 1 Ch 317; *Oldroyd v Harvey* [1907] P 326 (second codicil).

2 *Re Hall* (1871) LR 2 P & D 256 at 257.

3 As to republication see PARAS 405-407 post.

4 *Lushington v Onslow* (1848) 6 Notes of Cases 183; *Re Sykes* (1873) LR 3 P & D 26 at 27. See also *Christmas and Christmas v Whinyates* (1863) 3 Sw & Tr 81 at 89 (where mutilation of a will was presumed to have taken place after the execution of a codicil).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(6) ALTERATIONS AND ERASURES/378. Alterations by stranger.

378. Alterations by stranger.

A will altered by a stranger after execution by the testator must, if possible, be restored to the state in which it was at the time of execution, and probate is given without the alteration¹.

1 *Re Rolfe* (1846) 4 Notes of Cases 406. See also *Re North* (1842) 6 Jur 564; *Re Escott* (1842) 1 Notes of Cases 571.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(i) Revocation by Marriage/379. General rule.

(7) REVOCATION

(i) Revocation by Marriage

379. General rule.

With certain exceptions¹, a will is revoked by the testator's marriage², even if the marriage is voidable³, and whether or not it is in fact avoided⁴.

However, a will made in exercise of a power of appointment takes effect notwithstanding the testator's subsequent marriage, unless the property so appointed would in default of appointment pass to his personal representatives⁵. A will comprising property not subject to a power of appointment, and also property subject to appointment by the testator but falling within the above exception, is revoked by the marriage of the testator as to property not subject to the power, but remains valid as an appointment under the power⁶.

1 See the text to notes 5-6 infra; and PARAS 380-381 post.

2 As to wills made on or after 1 January 1983 see the Wills Act 1837 s 18(1) (s 18 substituted by the Administration of Justice Act 1982 s 18(1)). As to wills made before that date see the Wills Act 1837 s 18 (as

originally enacted). Section 18 (as substituted) does not affect any will made before 1 January 1983 (ie the date on which the Administration of Justice Act 1982 s 18(1) came into force): ss 73(7), 76(11). The general rule applies to soldiers' wills: *Re Wardrop* [1917] P 54. The marriage must be a lawful marriage: *Mette v Mette* (1859) 1 Sw & Tr 416; *Warter v Warter* (1890) 15 PD 152. As to persons who may lawfully marry see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 31 et seq.

As to the effect of divorce or annulment of marriage on testamentary provision for the former spouse see PARAS 468-469 post.

3 le voidable under the Matrimonial Causes Act 1973 s 12 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 331 et seq.

4 *Re Roberts, Roberts v Roberts* [1978] 3 All ER 225, [1978] 1 WLR 653, CA.

5 As to wills made before 1 January 1983 see the Wills Act 1837 s 18 (as originally enacted); and POWERS vol 36(2) (Reissue) PARA 352. As to wills made after 31 December 1982 see s 18(2) (as substituted: see note 2 supra). As to the nature of the grant of probate in such a case see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 150.

6 See *Re Russell* (1890) 15 PD 111; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 150.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(i) Revocation by Marriage/380. Will in contemplation of marriage made before 1983.

380. Will in contemplation of marriage made before 1983.

A will made after 31 December 1925 and before 1 January 1983¹ and expressed to be made in contemplation of a marriage is not revoked by the solemnisation of the marriage contemplated². To gain the benefit of this provision the whole³ will must have been made in contemplation of a particular marriage which was subsequently solemnised; a general statement that it was made in contemplation of marriage is not sufficient⁴. It is enough if on the terms of the will and in the circumstances the will 'practically expressed' that it was made in contemplation of the particular marriage⁵.

1 The Law of Property Act 1925 s 177(1), which applied to wills made after 31 December 1925 (s 177(2)), is repealed by the Administration of Justice Act 1982 s 75(1), Sch 9 Pt I, and replaced by provisions of that Act (see PARA 381 post). The repeal of the Law of Property Act 1925 s 177 does not, however, affect a will made before 1 January 1983 (ie the date on which the Administration of Justice Act 1982 s 18 came into force): ss 73(7), 76(11).

2 Law of Property Act 1925 s 177(1) (repealed: see note 1 supra). This overruled *Re Cadywold* (1858) 1 Sw & Tr 34 and *Otway v Sadleir* (1858) 4 Ir Jur NS 97.

3 *Re Coleman* [1976] Ch 1, [1975] 1 All ER 675.

4 *Sallis v Jones* [1936] P 43.

5 *Pilot v Gainfort* [1931] P 103 (where the testator referred to the woman whom he shortly afterwards married as 'my wife'); *Re Knight* (1944) (unreported) but referred to in *Re Langston* [1953] P 100 at 103, [1953] 1 All ER 928 at 930 ('my future wife'); *Re Langston* supra ('my fiancée').

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(i) Revocation by Marriage/381. Will in expectation of marriage made after 1982.

381. Will in expectation of marriage made after 1982.

Where it appears from a will made on or after 1 January 1983¹ that at the time it was made the testator was expecting to be married to a particular person, and that he intended that the will should not be revoked by the marriage, the will is not revoked by his marriage to that person².

Where it appears from a will made on or after 1 January 1983 that at the time it was made the testator was expecting to be married to a particular person, and that he intended that a disposition in the will should not be revoked by his marriage to that person, that disposition takes effect notwithstanding the marriage³. Further, any other disposition in the will takes effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage⁴.

1 The provisions of the Wills Act 1837 s 18 (as substituted) do not apply to any will made before 1 January 1983: see PARA 379 note 2 ante.

2 Ibid s 18(3) (substituted by the Administration of Justice Act 1982 s 18(1)).

3 Wills Act 1837 s 18(4)(a) (as substituted: see note 2 supra).

4 Ibid s 18(4)(b) (as substituted: see note 2 supra).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(ii) Revocation by Civil Partnership/382. General rule.

(ii) Revocation by Civil Partnership

382. General rule.

As from a day to be appointed, the following provisions have effect¹. With certain exceptions², a will is revoked by the formation of a civil partnership³ between the testator and another person⁴.

However, a will made in exercise of a power of appointment takes effect notwithstanding a subsequent formation of a civil partnership between the testator and another person, unless the property so appointed would in default of appointment pass to the testator's personal representatives⁵. A will comprising property not subject to a power of appointment, and also property subject to appointment by the testator but falling within the above exception, is revoked by the formation of a civil partnership between the testator and another person as to property not subject to the power, but remains valid as an appointment under the power⁶.

1 As from a day to be appointed, it will be possible to form a civil partnership, which is defined as a relationship between two persons of the same sex formed when they register as civil partners of each other under the Civil Partnership Act 2004: see s 1. Provision is made for the dissolution or annulment of a civil partnership (see Pt 2 Ch 2 (ss 37-64)) and for property and financial arrangements (see Pt 2 Ch 3 (ss 65-72)). At the date at which this volume states the law, no such day had been appointed. However, the Department of Trade and Industry has indicated that the Civil Partnership Act 2004 will be brought fully into force on 5 December 2005: see DTI Press Release, 21 February 2005. See also the Civil Partnership Act 2004 (Commencement No 1) Order 2005, SI 2005/1112, which brings into force on 15 April 2005 a number of provisions allowing regulations and rules to be made under the Act.

2 See the text to notes 4-5 infra; and PARA 383 post.

3 See note 1 supra. As to the effect of dissolution or annulment of civil partnership on testamentary provision for the former civil partner see PARA 470 post.

- 4 Wills Act 1837 s 18B(1) (s 18B prospectively added by the Civil Partnership Act 2004 s 71, Sch 4 paras 1, 2).
- 5 Wills Act 1837 s 18B(2) (prospectively added: see note 4 supra).
- 6 See *Re Russell* (1890) 15 PD 111; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 150.

UPDATE

382 General rule

TEXT AND NOTE 1--Provisions of 2004 Act cited all in force on date indicated: SI 2005/3175.

NOTE 4--1837 Act s 18B now in force: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(ii) Revocation by Civil Partnership/383. Will in expectation of civil partnership.

383. Will in expectation of civil partnership.

As from a day to be appointed, the following provisions have effect¹. Where it appears from a will that at the time it was made the testator was expecting to form a civil partnership with a particular person, and that he intended that the will should not be revoked by the formation of the civil partnership, the will is not revoked by its formation².

Where it appears from a will that at the time it was made the testator was expecting to form a civil partnership with particular person, and that he intended that a disposition in the will should not be revoked by the formation of the civil partnership, that disposition takes effect despite the formation of the civil partnership³. Further, any other disposition in the will takes effect also, unless it appears from the will that the testator intended the disposition to be revoked by the formation of the civil partnership⁴.

1 See PARA 382 note 1 ante.

2 Wills Act 1837 s 18B(3) (s 18B prospectively added by the Civil Partnership Act 2004 s 71, Sch 4 paras 1, 2). At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 ante). As to the meaning of 'civil partnership' see PARA 382 note 1 ante.

3 Wills Act 1837 s 18B(4), (5) (prospectively added: see note 2 supra).

4 Ibid s 18B(4), (6) (prospectively added: see note 2 supra).

UPDATE

383 Will in expectation of civil partnership

NOTE 1--Day now appointed: SI 2005/3175.

NOTE 2--Wills Act 1837 s 18B(3) has effect only if it appears from the language of the will that the testator expected to form a civil partnership with a particular person and intended that the will should not be revoked by that partnership: *Court v Despallieres*; *Re Ikin* [2009] EWHC 3340 (Ch), [2010] WTLR 437, [2009] All ER (D) 167 (Dec).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/A. IN GENERAL/384. Revocable nature of will.

(iii) Voluntary Revocation

A. IN GENERAL

384. Revocable nature of will.

A will is of its own nature revocable, and, even though a testator attempts to make his testament and last will irrevocable by the use of the strongest and most express terms, he may nevertheless revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable¹.

¹ *Vynior's Case* (1609) 8 Co Rep 81b. See also PARA 302 ante. As to the effect of contracts not to revoke a will see PARA 319 ante; as to the revocation of joint and mutual wills see PARA 321 ante; and as to the revocation of a privileged will see PARAS 371-372 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/A. IN GENERAL/385. Intention to revoke.

385. Intention to revoke.

To effect a revocation there must be an intention to revoke¹, and a will is not revoked by any presumption of intention based on an alteration of circumstances². If anything is done by the testator or by his direction which, if there were an intention to revoke, would amount to a revocation, the presumption of law from that act is in favour of the existence of the intention to revoke, but this presumption may be rebutted by evidence showing that that intention did not exist³. An act done without that intention is wholly ineffectual⁴, even if the act results in the destruction of the will⁵. Thus no revocation results where a testator destroys the will through inadvertence⁶, or under the belief that it is useless⁷ or invalid⁸, or has already been revoked⁹, or where he is drunk at the time of an alleged revocation¹⁰ or where he is suffering from mental disorder at the time, even though he subsequently recovers¹¹. Similarly, an express revocation clause in a subsequent, duly executed, will may be ineffective if it is made under a mistake or in the belief that some other disposition will take effect which in fact does not¹².

There must be an act of revocation accompanying the intention to revoke, and the expression of an intention to revoke at some future time or by some future instrument is not sufficient¹³. The fact that the act and intention of revocation are accompanied by an expression of intention to make a new will which is not in fact made does not prevent the revocation from being effective¹⁴.

The intention to revoke may be evidenced by the declarations of the testator, especially if those declarations were contemporaneous with the act of revocation¹⁵, or that intention may be inferred from the nature of the act done¹⁶.

Once due execution of a will is proved, the burden of showing that it has been revoked lies on those who seek to establish revocation, and, in the absence of proof, revocation is not presumed¹⁷.

- 1 Wills Act 1837 s 20.
- 2 Ibid s 19. See also *Re Wells' Trusts, Hardisty v Wells* (1889) 42 ChD 646 (where the will disposed of a fund which the testator afterwards disposed of by deed in such a way that the latter disposition was void as to one-fifth, and it was held that this one-fifth passed under the will).
- 3 See *Onions v Tyrer* (1716) 1 P Wms 343 at 344; *Burtenshaw v Gilbert* (1774) 1 Cowp 49 at 52; and PARA 398 post.
- 4 *Clarkson v Clarkson* (1862) 2 Sw & Tr 497; *Re Thornton* (1889) 14 PD 82.
- 5 *James v Shrimpton* (1876) 1 PD 431. See also *Clarkson v Clarkson* (1862) 2 Sw & Tr 497; *Cheese v Lovejoy* (1877) 2 PD 251 at 253, CA.
- 6 *Burtenshaw v Gilbert* (1774) 1 Cowp 49 at 52 per Lord Mansfield CJ.
- 7 *Beardsley v Lacey* (1897) 78 LT 25. See also *James v Shrimpton* (1876) 1 PD 431.
- 8 *Giles v Warren* (1872) LR 2 P & D 401; *Re Thornton* (1889) 14 PD 82.
- 9 *Scott v Scott* (1859) 1 Sw & Tr 258; *Clarkson v Clarkson* (1862) 2 Sw & Tr 497.
- 10 *Re Brassington* [1902] P 1.
- 11 *Scrubby and Finch v Fordham* (1822) 1 Add 74; *Re Shaw* (1838) 1 Curt 905; *Borlase v Borlase* (1845) 4 Notes of Cases 106 at 139; *Re Downer* (1853) 18 Jur 66; *Brunt v Brunt* (1873) LR 3 P & D 37; *Re Hine* [1893] P 282; *Re Sabatini* (1969) 114 Sol Jo 35 (where it was held that the same standards of mind and memory and degree of understanding are required as for the original making of the will). See also *Re Taylor, National and Provincial and Union Bank of England v Taylor* (1919) 64 Sol Jo 148 (missing will of person of unsound mind made before lunacy). The subsequent mental disorder of a testator does not effect a revocation of a will made when he was of sound mind: Swinburne on Wills (7th Edn) Pt II s 3; *Forest and Hemburg's Case* (1588) 4 Co Rep 606 at 616. Cf *Re Sabatini* supra.
- 12 See PARAS 399-401 post.
- 13 *Cleoburey v Beckett* (1851) 14 Beav 853. See also *Burton v Gowell* (1593) Cro Eliz 306; *Thomas d Jones v Evans* (1802) 2 East 488.
- 14 *Toomer v Sobinska* [1907] P 106; *Re Jones, Evans v Harries* [1976] Ch 200, [1976] 1 All ER 593, CA. It is possible, however, in cases of this kind for the revocation to be conditional on the contemplated new will being made, in which case the revocation may not be effective: see PARA 400 text and notes 4, 18 post.
- 15 *Clarke v Scripps* (1852) 2 Rob Eccl 563. See also *Stride v Cooper* (1811) 1 Phillim 334 at 338.
- 16 *Clarke v Scripps* (1852) 2 Rob Eccl 563; *North v North* (1909) 25 TLR 322.
- 17 *Harris v Berrall* (1858) 1 Sw & Tr 153; *Sprigge v Sprigge* (1868) LR 1 P & D 608; *Benson v Benson* (1870) LR 2 P & D 172; *Re Taylor, National and Provincial and Union Bank of England v Taylor* (1919) 64 Sol Jo 148. Where, however, the testator has had possession of a will (while of sound mind) and it either cannot be found after his death or is found mutilated or destroyed, there is a rebuttable presumption that it has been destroyed with intention to revoke it: see PARA 398 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/A. IN GENERAL/386. Methods of revocation.

386. Methods of revocation.

Voluntary revocation¹ of a will or codicil can only be effected:

- 27 (1) by another later will or codicil duly executed²;

- 28 (2) by some writing declaring an intention to revoke the will or codicil and duly executed as a will³; or
- 29 (3) by the burning, tearing or otherwise destroying⁴ of the will or codicil by the testator, or by some person in his presence and by his direction, with the intention of revoking it⁵.

No conveyance or other act made or done subsequently to the execution of a will or codicil of or relating to any real or personal estate comprised in it, except an act by which the will or codicil is revoked, prevents the operation of the will with respect to such estate or interest in the real or personal estate as the testator has power to dispose of by will at the time of his death⁶.

As a will speaks from the testator's death⁷ and can be revoked only in one or other of the prescribed ways⁸, a testator cannot delegate the power to revoke his will after his death⁹.

A will is not revoked, nor the construction of it altered, by reason of any subsequent change of domicile of the testator¹⁰.

1 As to revocation by marriage or civil partnership see PARAS 379, 382 ante.

2 As to revocation by later instrument see PARA 387 et seq post.

3 See PARA 387 et seq post.

4 As to revocation by destruction see PARAS 393-398 post.

5 Wills Act 1837 s 20. Section 20 does not apply to soldiers' wills: *Re Gossage, Wood v Gossage* [1921] P 194, CA. The manner in which devises in writing of land might be revoked was formerly laid down by the Statute of Frauds (1677) s 6 (repealed).

6 Wills Act 1837 s 23. The result of this provision is that the cases in which it was formerly held that a will was revoked by an alteration of the estate of the testator are no longer law: *Ford v De Pontès* (1861) 30 Beav 572 at 593. The provision refers to an interest of the testator remaining in the property, and does not apply to cases where the thing meant to be given is gone: *Moor v Raisbeck* (1841) 12 Sim 123 at 139; *Blake v Blake* (1880) 15 ChD 481 at 487 (following *Gale v Gale* (1856) 21 Beav 349). As to ademption by alteration of estate see PARA 446 post; and as to a change in the nature of the property subject to a power exercised by will see POWERS vol 36(2) (Reissue) PARA 308.

7 See PARAS 301 ante, 573 post.

8 See the Wills Act 1837 s 18 (as substituted), s 18B (as added), s 20; the text and notes 1-6 supra; and PARAS 379-383 ante.

9 *Stockwell v Ritherdon* (1848) 1 Rob Eccl 661.

10 Wills Act 1963 s 4 (repealing and for this purpose replacing the Wills Act 1861 s 3); *Re Reid* (1866) LR 1 P & D 74. See also *Re Groos* [1904] P 269; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 453.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/387. Instrument of revocation.

B. REVOCATION BY LATER INSTRUMENT

387. Instrument of revocation.

To be effectual, an instrument declaring an intention to revoke¹ a will must be executed in the manner in which a will is required to be executed². Such an instrument is not, however, admitted to probate³ unless it is itself of a testamentary character⁴.

An earlier will is revoked by a later will or codicil expressly revoking that earlier will or all former wills⁵, and no particular form of words is required for the purpose of effecting the revocation⁶. An express clause of revocation is not essential⁷, but, if inserted in general terms, operates as a rule to revoke all testamentary instruments previously executed by the testator⁸, including, usually, testamentary appointments⁹. Such a clause is not, however, conclusive evidence of an intention to effect a complete revocation¹⁰, and may be shown to have been inserted by mistake and without the approval of the testator¹¹, or to have been dependent on another disposition taking effect which has not in fact taken effect¹².

The words 'last will' do not necessarily operate to revoke all previous testamentary instruments¹³, nor even the words 'last and only will'¹⁴; but, where it is clear from the general tenor of the last will that the testator did not intend an earlier will to remain in force, the earlier will is revoked¹⁵.

1 As to what amounts to such a declaration see *Re Gosling* (1886) 11 PD 79.

2 Wills Act 1837 s 20. A privileged will may, however, be revoked by an unattested instrument: *Re Gossage, Wood v Gossage* [1921] P 194, CA; *Re Newland* [1952] P 71, [1952] 1 All ER 841.

3 *Re Fraser* (1869) LR 2 P & D 40; *Re Eyre* [1905] 2 IR 540. As to the form of grant of administration in such a case see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 199.

4 *Re Hubbard* (1865) LR 1 P & D 53; *Re Hicks* (1869) LR 1 P & D 683; *Re Durance* (1872) LR 2 P & D 406 (where a letter signed by the testator and duly attested directing his brother to obtain his will and burn it unread was held sufficient to revoke the will); *Re Spracklan's Estate* [1938] 2 All ER 345, CA.

5 Wills Act 1837 s 20.

6 *Birks v Birks* (1865) 4 Sw & Tr 23 at 30; *Cottrell v Cottrell* (1872) LR 2 P & D 397; *Re Brennan* [1932] IR 633. The insertion in the attestation clause of words referring to the revocation of a previous codicil have been held to have no operative effect: *Re Atkinson* (1883) 8 PD 165.

7 *Dempsey v Lawson* (1877) 2 PD 98 at 107; *Re Brennan* [1932] IR 633.

8 *Sotheran v Dening* (1881) 20 ChD 99, CA. See also *Cottrell v Cottrell* (1872) LR 2 P & D 397.

9 *Sotheran v Dening* (1881) 20 ChD 99, CA; *Re Kingdon, Wilkins v Pryer* (1886) 32 ChD 604 (where a testamentary appointment under a special power was held to be revoked by a general revocatory clause). Although a general clause of revocation does not necessarily revoke an exercise of a power of appointment, it requires cogent evidence to exclude revocation (*Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1935] P 151), but such evidence may be supplied by the surrounding circumstances (*Smith v Thompson* (1931) 47 TLR 603). See also *Cadell v Wilcocks* [1898] P 21 at 26. It is open to doubt whether or not a will made in exercise of a power is revoked by a second will made in exercise of another power and containing a general clause of revocation: see *Re Merritt* (1858) 1 Sw & Tr 112; *Re Joys* (1860) 4 Sw & Tr 214 (decisions which were considered unfavourably but not overruled by Jessel MR in *Sotheran v Dening* supra at 105-106).

10 *Denny v Barton and Rashleigh* (1818) 2 Phillim 575; *O'Leary v Douglass* (1878) 1 LR Ir 45 at 50. See also *Gladstone v Tempest* (1840) 2 Curt 650; *Dempsey v Lawson* (1877) 2 PD 98 at 107; *Re O'Connor* [1942] 1 All ER 546; *Re Wayland* [1951] 2 All ER 1041.

11 *Powell v Mouchett, Lichfield v Mouchett* (1821) Madd & G 216; *Re Oswald* (1874) LR 3 P & D 162; *Re Moore* [1892] P 378; *Marklew v Turner* (1900) 17 TLR 10; *Re Hope Brown* [1942] P 136, [1942] 2 All ER 176; *Re Cocke* [1960] 2 All ER 289, [1960] 1 WLR 491; *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256. See *Re Wayland* [1951] 2 All ER 1041; *Re Vickers' Estate* 2001 JLR 712, (2001-02) 4 ITEL 584, Royal Ct Jer (where general revocation clauses in wills disposing of property in one country were held not to revoke wills disposing of property elsewhere). See also *Re Chief Edward Iguda Aleyideino's Estate, Aleyideino v Aleyideino* [2003] JRC 018, 2003 JLR Note 7, (2003-04) 6 ITEL 584, Royal Ct Jer (English will and later Nigerian will with conflicting provisions). See further PARAS 399, 401 post. As to the court's power to rectify a will see PARA 408 post.

12 See PARA 400 post.

13 *Cutto v Gilbert* (1854) 9 Moo PCC 131 (overruling on this point *Plenty v West and Budd* (1845) 1 Rob Eccl 264). See also *Stoddart v Grant* (1852) 1 Macq 163 at 171, HL, per Lord Truro; *Freeman v Freeman* (1854) 5 De GM & G 704; *Lemage v Goodban* (1865) LR 1 P & D 57; *Re Howard* (1869) LR 1 P & D 636; *Leslie v Leslie* (1872) IR 6 Eq 332; *Re de la Saussaye* (1873) LR 3 P & D 42; *Re Petchell* (1874) LR 3 P & D 153 at 156; *Re O'Connor* (1884) 13 LR Ir 406; *Kitcat v King* [1930] P 266; *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384. In *Loftus v Stoney* (1867) 17 I Ch R 178, two wills, one described as 'last' and the other 'duplicate', were admitted to probate, and the court of construction held that the will marked 'last' was the real will. The express confirmation in a third codicil of a will and one of two previous codicils does not of itself operate to revoke the other codicil: *Follett v Pettman* (1883) 23 ChD 337.

14 *Simpson v Foxon* [1907] P 54 (following *Lemage v Goodban* (1865) LR 1 P & D 57).

15 *Pepper v Pepper* (1870) IR 5 Eq 85; *Dempsey v Lawson* (1877) 2 PD 98; *Re Brennan* [1932] IR 633. See also PARAS 390-391 post.

UPDATE

387 Instrument of revocation

NOTE 6--See also *Lamothe v Lamothe* [2006] EWHC 1387 (Ch), [2006] WTLR 1431.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/388. Partial revocation.

388. Partial revocation.

Either the whole or part only of a will may be revoked¹. The intention to revoke governs the extent and measure of operation to be attributed to an act of revocation which may extend either to the whole or part only of a will². Where revocation of part makes the rest of the will unintelligible, total revocation results³. A gift of residue by a will is revoked by a different gift of residue by a codicil, even though the codicil purports to deal with residue of property not disposed of by the will⁴. An interest clearly given by a will must not, however, be treated as taken away by a revocatory clause in a codicil unless that intention is clearly expressed⁵. Such an intention is not expressed merely by the addition of words of construction susceptible of being read as relating to the same subject matter and directing the will to be construed in a particular way⁶.

1 See the Wills Act 1837 s 20.

2 *Clarke v Scripps* (1852) 2 Rob Eccl 563; *Re Woodward* (1871) LR 2 P & D 206; *Re White* (1879) 3 LR Ir 413 at 416, Ir CA. A mere recital of the testator's object in revoking a gift does not, it seems, limit the operation of an absolute revocation: *Holder v Howell* (1803) 8 Ves 97. As to the effect of the revocation of a devise on an accessory gift of chattels see PARA 672 post. As to a general revocation clause being effective to revoke only parts of an earlier will as a consequence of mistake or the revocation being in part dependent on other dispositions taking effect see *Re Finemore* [1992] 1 All ER 800, [1991] 1 WLR 793; and PARAS 400-401 post.

3 *Leonard v Leonard* [1902] P 243.

4 *Earl Hardwicke v Douglas* (1840) 7 Cl & Fin 795, HL; *Re Pereira, Worsley v Society for the Propagation of the Gospel* (1912) 56 Sol Jo 614; *Re Stoodley, Hooson v Locock* [1916] 1 Ch 242, CA. Cf the effect of two residuary clauses in the same will: *Re Gare, Filmer v Carter* [1952] Ch 80, [1951] 2 All ER 863.

5 *Re Wray, Wray v Wray* [1951] Ch 425, [1951] 1 All ER 375, CA (where a codicil which revoked the appointment of the executrix and directed that the will should take effect as if her name were omitted did not prevent her taking a beneficial interest (following *Re Percival, Boote v Dutton* (1888) 59 LT 21, CA, and *Re Freeman, Hope v Freeman* [1910] 1 Ch 681)); *Re Spensley's Will Trusts, Barclays Bank Ltd v Staughton* [1952]

Ch 886, [1952] 2 All ER 49 (revsd on another point [1954] Ch 233, [1954] 1 All ER 178, CA) (where a codicil revoking all provisions for B and directing that the will should be read as if her name did not occur revoked a power of appointment conferred on her, but not a trust in default of appointment in favour of B's children). See also *Kellett v Kellett* (1868) LR 3 HL 160 at 167; *Re Brough, Currey v Brough* (1888) 38 ChD 456; *Re Wilcock, Kay v Dewhirst* [1898] 1 Ch 95 at 98; *Pennefather v Lloyd* [1917] 1 IR 337; *Re Nixon, Askew v Briggs* (1965) 109 Sol Jo 757.

6 See *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] Ch 418, [1971] 3 All ER 433 (where a gift by will was revoked by a codicil containing not only words of revocation but also a direction that the will was in all respects to be construed as if the gift had not been made; and it was held that such a direction merely enforced the words of revocation without affecting the remaining provisions of the will).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/389. Later will lost.

389. Later will lost.

Where a later will cannot be produced, the burden of showing that it revoked an earlier will is on the person alleging revocation, and there must be either proof that it contained a clause revoking earlier wills¹ or proof of a difference of disposition². Accordingly, where a testator makes two wills and the later is lost or destroyed, and there is no secondary evidence of its contents showing that it expressly or impliedly revoked the earlier will, the earlier will is admitted to probate³. If, however, there is such evidence, probate of the first will may be refused, and intestacy may result⁴.

1 For this purpose, secondary evidence, including declarations of the testator made after execution, has always been admissible of the contents of the last will: *Barkwell v Barkwell* [1928] P 91. Such evidence must, however, be stringent and conclusive: *Cutto v Gilbert* (1854) 9 Moo PCC 131; *Re Wyatt* [1952] 1 All ER 1030; *Re Dear* [1975] 2 NZLR 254, NZ CA (not following *Re Hampshire* [1951] WN 174, where less than stringent evidence was accepted). See also the Civil Evidence Act 1995 ss 1-7 (under which hearsay evidence is in general admissible); and CIVIL PROCEDURE vol 11 (2009) PARA 808 et seq. Where a will has been lost or destroyed in such circumstances that it is not revoked, secondary evidence may be given of its contents: see CIVIL PROCEDURE vol 11 (2009) PARA 880; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 110.

2 *Cutto v Gilbert* (1854) 9 Moo PCC 131 at 147. See also *Goodright d Rolfe v Harwood* (1775) 7 Bro Parl Cas 489; *Wood v Wood* (1867) LR 1 P & D 309 (following *Brown v Brown* (1858) 8 E & B 876 at 886); *Re Debac, Sanger v Hart* (1897) 77 LT 374; *Re Wyatt* [1952] 1 All ER 1030.

3 *Hitchins v Basset* (1688) 2 Salk 592 (affd sub nom *Hungerford v Nosworthy* (1694) Show Parl Cas 146); *Goodright d Rolfe v Harwood* (1775) 7 Bro Parl Cas 489; *Dickinson v Stidolph* (1861) 11 CBNS 341 at 357; *Hellier v Hellier* (1884) 9 PD 237; *Re Wyatt* [1952] 1 All ER 1030. As to probate of the contents of a lost will see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 110.

4 *Wood v Wood* (1867) LR 1 P & D 309.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/390. Later inconsistent will.

390. Later inconsistent will.

A later will or codicil may revoke all earlier wills, even though it contains no clause of revocation. It is a question of intention in each case. Where a later unambiguous will deals with the testator's entire property, it revokes all earlier wills¹, and, if the later will practically covers

the same ground as an earlier one, it must be taken as being in substitution for it, and probate of the later will alone be granted². Even where the later will does not completely cover the whole subject matter of an earlier one, if it can be gathered from the language of the testator that he intended to dispose of his property in a different manner from that in which he disposed of it by the earlier will, the earlier instrument is revoked³.

The mere fact of making a subsequent testamentary disposition does not, however, effect a total revocation of a prior will unless the later disposition expressly or in effect revokes the former, or the two are incapable of standing together⁴. The probate court may decide the question for itself and refuse to admit the earlier document to probate or it may admit several documents to probate and leave it to the court of construction to determine the testator's real testamentary intentions. In such a case the court of construction may still decide that a document admitted to probate has been revoked⁵. A later inconsistent disposition which is not valid for any reason does not revoke an earlier disposition⁶. Where a will has been revoked by a later will and then revived by a codicil, then, unless the codicil expressly revokes the later will or impliedly revokes it by reason of the fact that it involves dispositions inconsistent with those contained in the will, all three documents are admitted to probate and their effect is left for the court of construction to determine⁷. The mere fact that a codicil is described as a codicil to an earlier will does not impliedly revoke a later will⁸, although it may have this effect⁹.

If there are two wholly inconsistent testamentary documents of the same date, or undated, and it cannot be ascertained which of them was executed first, neither document may be admitted to probate¹⁰. They may, however, be effective to revoke all earlier wills¹¹.

1 *Henfrey v Henfrey* (1842) 4 Moo PCC 29; *Pepper v Pepper* (1870) IR 5 Eq 85; *Re Palmer, Palmer v Peat* (1889) 58 LJP 44; *Cadell v Wilcocks* [1898] P 21; *Re Fawcett* [1941] P 85, [1941] 2 All ER 341. Where some of the clauses in the earlier will are repeated, but otherwise the new will, which covers the whole of the testator's property, is inconsistent with the earlier will, the whole will is revoked and the repeated clauses take effect under the new will: *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384.

2 *O'Leary v Douglass* (1879) 3 LR Ir 323, Ir CA. See also *Dempsey v Lawson* (1877) 2 PD 98; *Re Turnour* (1886) 56 LT 671; *Re Palmer, Palmer v Peat* (1889) 58 LJP 44; *M'Ara v M'Cay* (1889) 23 LR Ir 138; *Cadell v Wilcocks* [1898] P 21; and see *Chichester v Quatrefages* [1895] P 186 (codicils).

3 *Dempsey v Lawson* (1877) 2 PD 98 at 105; *Re Bryan* [1907] P 125 at 129; *Re Brennan* [1932] IR 633; *Jones v Treasury Solicitor* (1932) 49 TLR 75, CA.

4 *Lemage v Goodban* (1865) LR 1 P & D 57; *Re Petchell* (1874) LR 3 P & D 153; *Re Summers* (1901) 84 LT 271; *Townsend v Moore* [1905] P 66, CA; *Simpson v Foxon* [1907] P 54; *Reeves v Reeves* [1909] 2 IR 521. Where there is no real inconsistency between two wills made by a testator, the second does not revoke the first: *Deakin v Garvie* (1919) 36 TLR 122, CA.

5 *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384; approved in *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514, [1967] 3 All ER 915, PC. Where the revocation of an earlier will is wholly a matter of construction, it is possible for the matter to be determined in construction proceedings instead of probate proceedings as in *Re Finemore* [1992] 1 All ER 800, [1991] 1 WLR 793. As to the construction of wills by the court see PARA 476 et seq post.

6 See PARA 399 note 2 post.

7 See *Re Stedham, Re Dyke* (1881) 6 PD 205; *Re Chilcott* [1897] P 223 (all three documents admitted); *Re Lewis* (1860) 25 JP 280 (later will held revoked); and PARA 404 text and note 8 post.

8 See note 7 supra.

9 *Re Reynolds* (1873) LR 3 P & D 35; *Re Baker, Baker v Baker* [1929] 1 Ch 668; *Re Alford* (1939) 83 Sol Jo 566; *Re Pearson, Rowling v Crowther* [1963] 3 All ER 763, [1963] 1 WLR 1358.

10 *Phipps v Earl of Anglesey* (1751) 7 Bro Parl Cas 443; *Loftus v Stoney* (1867) 17 I Ch R 178; *Townsend v Moore* [1905] P 66, CA.

11 *Re Howard, Howard v Treasury Solicitor* [1944] P 39.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/391. Partly inconsistent wills.

391. Partly inconsistent wills.

Where there are several testamentary instruments which are not wholly inconsistent, they are considered, so far as they can be read together, as constituting the last will of the testator¹. Any number of testamentary instruments, whatever their relative date or in whatever form they may be, may be admitted to probate as together constituting the last will of the deceased². The presumption against implied revocation is strengthened where the testator uses words showing an intention not to alter his testamentary disposition except in certain specific respects³. The question is what disposition the testator intended, not which or what numbers of papers he desired or expected to be admitted to probate⁴. Consequently, the presumption of revocation arising from an apparent inconsistency of testamentary instruments may be rebutted by extrinsic evidence that the testator did not intend revocation (including direct evidence of his intention), where there is some ambiguity on the face of the documents as to whether the deceased meant the particular disposition to be part of his will⁵, or where some ambiguity in the light of surrounding circumstances is revealed by extrinsic evidence other than evidence of the testator's intention⁶. If, however, there is no ambiguity arising in either of these ways, extrinsic evidence may not be admitted to show that revocation was not intended⁷.

1 *Re Budd* (1862) 3 Sw & Tr 196; *Birks v Birks* (1865) 4 Sw & Tr 23; *Lemage v Goodban* (1865) LR 1 P & D 57; *Re Fenwick* (1867) LR 1 P & D 319; *Re Griffith* (1872) LR 2 P & D 457; *Re Petchell* (1874) LR 3 P & D 153; *Re Hartley* (1880) 50 LJP 1; *Deakin v Garvie* (1919) 36 TLR 122, CA. See also *Re Chester*, *Ryan v Chester* (1914) 49 ILT 97.

2 *Lemage v Goodban* (1865) LR 1 P & D 57; *Townsend v Moore* [1905] P 66, CA; *Deakin v Garvie* (1919) 36 TLR 122, CA.

3 *Follett v Pettman* (1883) 23 ChD 337.

4 *Dempsey v Lawson* (1877) 2 PD 98 at 107.

5 *Blackwood v Damer* (1783) 3 Phillim 458n; *Methuen v Methuen* (1817) 2 Phillim 416; *Greenough v Martin* (1824) 2 Add 239 at 243; *Busteed v Eager* (1834) Milw 345 at 348. See also *Fawcett v Jones*, *Codrington and Pulteney* (1810) 3 Phillim 434 at 478.

6 In relation to deaths on or after 1 January 1983 see the Administration of Justice Act 1982 s 21; and PARA 483 post. As to the law on admissibility of evidence in relation to deaths before that date see *Jenner v Finch* (1879) 5 PD 106; *Paton v Ormerod* [1892] P 247; *Re Bryan* [1907] P 125; *Re Brennan* [1932] IR 633.

7 In relation to deaths on or after 1 January 1983 see the Administration of Justice Act 1982 s 21; and PARA 483 post. See also *Thorne v Rooke* (1841) 2 Curt 799.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/B. REVOCATION BY LATER INSTRUMENT/392. Revocation by codicil.

392. Revocation by codicil.

Where a will is revoked by a subsequent codicil, the question whether an intermediate codicil is also revoked is one of construction. If the revoking codicil distinguishes between the will and the intermediate codicil, for example by date, the intermediate codicil is not revoked¹. The revocation of a will does not revoke a codicil to it by implication², as a properly executed testamentary paper may be revoked only by the methods prescribed by statute³.

1 *Farrer v St Catharine's College, Cambridge* (1873) LR 16 Eq 19. See also *Pratt v Pratt* (1844) 14 Sim 129; *Green v Tribe* (1878) 9 ChD 231; *Follett v Pettman* (1883) 23 ChD 337; *Scott's Trustees v Duke* 1916 SC 732. Cf *Re Resch's Will Trusts*, *Le Cras v Perpetual Trustee Co Ltd*, *Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514, [1967] 3 All ER 915, PC (where a third codicil confirming only the will and describing itself as a first codicil was held as a matter of construction not to have revoked the two prior codicils by inference).

2 *Re Savage* (1870) LR 2 P & D 78 (following *Black v Jobling* (1869) LR 1 P & D 685; and disapproving *Clogstoun v Walcott* (1848) 5 Notes of Cases 623 and *Grimwood v Cozens* (1860) 2 Sw & Tr 364). See also *Re Coulthard* (1865) 11 Jur NS 184; *Re Turner* (1872) LR 2 P & D 403; *Farrer v St Catharine's College, Cambridge* (1873) LR 16 Eq 19; *Gardiner v Courthope* (1886) 12 PD 14; *Re Clements* [1892] P 254.

3 See the Wills Act 1837 s 18 (as substituted), s 18B (as added), s 20; and PARAS 379, 382, 386 ante. In *Re Bleckley* (1883) 8 PD 169, where there was evidence that the testator, by cutting off his signature to his will, intended to revoke a codicil to it written on the same piece of paper, the codicil was held to be revoked, but the point was not argued.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/C. REVOCATION BY DESTRUCTION/393. Destruction with intention to revoke.

C. REVOCATION BY DESTRUCTION

393. Destruction with intention to revoke.

A will may be revoked by being burnt, torn or otherwise destroyed¹ by the testator, or by some person in his presence and by his direction, with the intention of revoking it². For this purpose, there must be both an act of destruction³ and an intention to revoke⁴. A symbolical destruction is not sufficient, so that mere abandonment will not suffice⁵. A will is not destroyed by being struck through with a pen⁶, even though done with the intention to revoke⁷, for cancelling is not one of the modes of revocation⁸. Moreover, a will is not revoked by being destroyed by mistake⁹ or in a fit of madness¹⁰, as even the most complete form of destruction without intention does not revoke a will¹¹.

The intention to revoke a will wholly or in part may be evidenced by proof of the testator's expressed intention in doing the act¹², or of circumstances from which the intention may be inferred, or by the state and condition to which the instrument has been reduced by the act itself¹³.

Declarations by the testator that he had destroyed his will are now admissible to prove both his intention to revoke it and the fact of destruction¹⁴.

1 This includes 'cutting': *Hobbs v Knight* (1838) 1 Curt 768; *Re Cooke* (1847) 5 Notes of Cases 390.

2 Wills Act 1837 s 20. See PARA 396 post. See also *Re Gossage*, *Wood v Gossage* [1921] P 194, CA (where, although the will was burnt by the direction of the testator, this was not done in his presence).

3 *Cheese v Lovejoy* (1877) 2 PD 251 at 253, CA; *Andrew v Motley* (1862) 12 CBNS 514.

4 *Powell v Powell* (1866) LR 1 P & D 209 at 212; *Giles v Warren* (1872) LR 2 P & D 401. An object of the Statute of Frauds (1677) (see PARA 386 note 5 ante) and of the Wills Act 1837 was to prevent the proof of revocation depending on oral evidence: *Doe d Reed v Harris* (1837) 6 Ad & El 209.

5 See the cases cited in note 3 supra.

6 *Stephens v Taprell* (1840) 2 Curt 458 at 465; *Cheese v Lovejoy* (1877) 2 PD 251, CA. As to revocation by destroying signatures see PARA 397 post.

7 *Re Brewster* (1859) 6 Jur NS 56. See also *Re Rose* (1845) 4 Notes of Cases 101; *Benson v Benson* (1870) LR 2 P & D 172.

8 'Otherwise destroying' in the Wills Act 1837 s 20 means destroying by some method ejusdem generis with those described in s 20: *Stephens v Taprell* (1840) 2 Curt 458. An obliteration of a legacy may, however, effect a revocation of the legacy: see PARA 374 ante. See also PARA 397 post.

9 *Giles v Warren* (1872) LR 2 P & D 401; *Re Thornton* (1889) 14 PD 82; *Beardsley v Lacey* (1897) 67 LJP 35; *Re Greenstreet* (1930) 74 Sol Jo 188. See also *Re Southerden*, *Adams v Southerden* [1925] P 177, CA; *Re Carey* (1977) 121 Sol Jo 173; and PARAS 400-401 post. As to the evidence of the mistake see *Re Templemore* (1925) 69 Sol Jo 382.

10 *Brunt v Brunt* (1873) LR 3 P & D 37. As to the necessary intention see PARA 385 ante.

11 *Cheese v Lovejoy* (1877) 2 PD 251 at 253, CA, per James LJ. See also *Re King* (1851) 2 Rob Eccl 403; *Re Coleman* (1861) 2 Sw & Tr 314; *Clarkson v Clarkson* (1862) 2 Sw & Tr 497; *Re Thornton* (1889) 14 PD 82; *Re Brassington* [1902] P 1.

12 See CIVIL PROCEDURE vol 11 (2009) PARA 806 et seq.

13 *Clarke v Scripps* (1852) 2 Rob Eccl 563 at 567; *Christmas and Christmas v Whinyates* (1863) 3 Sw & Tr 81; *Re Maley* (1887) 12 PD 134. Partial tearing which leaves all the words distinct and legible does not necessarily show an intention to revoke the will: *Re Cowling*, *Jinkin v Cowling* [1924] P 113.

14 *Re Bridgewater* [1965] 1 All ER 717, [1965] 1 WLR 416, applying the Evidence Act 1938 s 1 (repealed: see now the Civil Evidence Act 1995 ss 1-7, under which hearsay evidence is in general admissible; and CIVIL PROCEDURE vol 11 (2009) PARA 808 et seq). As to the previous law see *Keen v Keen* (1873) LR 3 P & D 105 at 107 per Sir J Hannen; *Re Maley* (1887) 12 PD 134.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/C. REVOCATION BY DESTRUCTION/394. Destruction of duplicate.

394. Destruction of duplicate.

The destruction with the intention of revocation of one part of a will executed in duplicate amounts to a revocation, whether only one part or both parts were in the possession of the testator, and the presumption generally is that by such destruction the testator intended complete revocation¹. Similarly, if the duplicate in the testator's possession cannot be found after his death, the presumption applies². The presumption is not so strong where the testator destroys one of two duplicates both in his own possession, especially if he has previously made alterations on the part so destroyed³.

1 *Onions v Tyrer* (1716) 1 P Wms 343 at 346; *Boughey v Moreton* (1758) 2 Lee 532; *Burtenshaw v Gilbert* (1774) 1 Cowp 49; *Rickards v Mumford* (1812) 2 Phillim 23; *Colvin v Fraser* (1829) 2 Hag Ecc 266; *Re Slade* (1869) 20 LT 330. See also *Pemberton v Pemberton* (1807) 13 Ves 290.

2 *Jones v Harding* (1887) 58 LT 60; *Paige v Brooks* (1896) 75 LT 455.

3 *Pemberton v Pemberton* (1807) 13 Ves 290 at 310 per Lord Erskine LC; *Re Hains* (1847) 5 Notes of Cases 621.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/C. REVOCATION BY DESTRUCTION/395. Incomplete destruction.

395. Incomplete destruction.

If a testator leaves unfinished the work of destruction which he had commenced, either in consequence of the interference of a third person or by his own voluntary change of purpose, the will is unrevoked, the intention to revoke being itself revoked before the act was complete¹. Similarly, probate has been granted of a will the signature to which had been partially erased and rewritten, on the basis that there was no intention to revoke², and also where the testator had cut out, but replaced, the part containing the signatures of the witnesses³. Probate was not, however, granted where the testator's signature had been cut out and pasted on in the previous position⁴.

1 *Doe d Perkes v Perkes* (1820) 3 B & Ald 489; *Re Colberg* (1841) 2 Curt 832; *Elms v Elms* (1858) 1 Sw & Tr 155.

2 *Re Kennett* (1863) 2 New Rep 461. See also *Re Baron De Bode* (1847) 5 Notes of Cases 189.

3 *Re Eeles* (1862) 2 Sw & Tr 600 (where probate was granted with the consent of the parties interested on intestacy).

4 *Bell v Fothergill* (1870) LR 2 P & D 148; *Magnesi v Hazelton* (1881) 44 LT 586. See also PARA 397 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/C. REVOCATION BY DESTRUCTION/396. Destruction by stranger.

396. Destruction by stranger.

Destruction by a third person in the presence and by the direction of the testator is effectual¹. Destruction by the testator's direction, but not in his presence, is, however, ineffectual², and the testator cannot revoke his will by subsequent ratification of a previous unauthorised act of destruction by a third person³. If a will is accidentally destroyed by fire, the mere acquiescence of the testator does not effect a revocation⁴.

1 Wills Act 1837 s 20.

2 *Re Dadds* (1857) Dea & Sw 290; *De Kremer, Lundbeck v De Kremer* (1965) 110 Sol Jo 18.

3 *Gill v Gill* [1909] P 157. See also *Mills v Millward* (1889) 15 PD 20.

4 *Re Booth, Booth v Booth* [1926] P 118.

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397. Extent of destruction.

To effect destruction there must be sufficient damage, with the intention to revoke, to destroy the entirety of the will¹, but it is sufficient if its essence as a will is destroyed, even though the materials of which it is composed are not². Thus cutting off the testator's signature³ or scratching it out with a knife⁴, or obliterating the testator's signature with a ball-point pen so that it is no longer apparent⁵, unless done under a mistaken belief as to the effect of the will⁶, or the testator's cutting off of the signatures of attesting witnesses⁷, or of any part of the will which he has expressly made part of it⁸, if done with the intention to revoke, operates as a revocation unless otherwise explained⁹. Erasure by witnesses of their own signatures does not, however, revoke the will¹⁰.

Where a portion of a will not necessary to its validity as a testamentary instrument is destroyed, the question is whether the portion destroyed is so important as to raise the presumption that the rest cannot have been intended to stand without it, or whether it is unimportant and independent of the rest of the will¹¹. Where a testator destroys some sheets of a will and substitutes others, but does not re-execute the whole will, there is a revocation¹², but merely tearing off part of the commencement of a will¹³, or a clause containing legacies¹⁴ or appointing executors¹⁵, does not necessarily revoke the rest of the will¹⁶.

1 *Price v Powell* (1858) 3 H & N 341.

2 *Hobbs v Knight* (1838) 1 Curt 768 at 779-780.

3 *Re Gullan* (1858) 1 Sw & Tr 23; *Re Lewis* (1858) 1 Sw & Tr 31; *Re Simpson* (1859) 5 Jur NS 1366. See also *Hobbs v Knight* (1838) 1 Curt 768; *Bell v Fothergill* (1870) LR 2 P & D 148.

4 *Re Morton* (1887) 12 PD 141. Where, however, the signature is legible, the will is valid: *Re Godfrey* (1893) 69 LT 22.

5 *Re Adams* [1990] Ch 601, [1990] 2 All ER 97. The same test applies for the purposes of deciding whether an obliteration constitutes destruction for the purposes of the Wills Act 1837 s 20 (see PARA 393 ante) as applies for deciding whether an obliteration of part of a will has made it no longer apparent for the purposes of s 21 (see PARA 374 ante): *Re Adams* supra at 607 and 102.

6 *Stamford v White* [1901] P 46. As to mistake see PARA 401 post.

7 *Evans v Dallow, Re Dallow* (1862) 31 LJP & A 128.

8 *Price v Price* (1858) 27 LJ Ex 409; *Williams v Tyley* (1858) John 530.

9 *Re Wheeler* (1879) 49 LJP 29. The accidental cutting through of a witness's signature is not a revocation: *Re Taylor* (1890) 63 LT 230. As to mistake see PARA 401 post.

10 *Margary v Robinson* (1886) 12 PD 8; *Re Greenwood* [1892] P 7.

11 *Clarke v Scripps* (1852) 2 Rob Eccl 563; *Re White* (1879) 3 LR Ir 413, Ir CA; *Leonard v Leonard* [1902] P 243 at 248 (where the last three sheets of a will were unintelligible without the first two sheets, which had been destroyed, and the whole was held to be revoked); *Re Green, Ward v Bond* (1962) 106 Sol Jo 1034 (where the first two pages had been destroyed and the last page so mutilated that it was unintelligible and unworkable as a testamentary document and the whole will was held to be revoked).

12 *Treloar v Lean* (1889) 14 PD 49; *Leonard v Leonard* [1902] P 243. See also *Gullan v Grove* (1858) 26 Beav 64.

13 *Re Woodward* (1871) LR 2 P & D 206.

14 *Re Nelson* (1872) IR 6 Eq 569. See also *Christmas and Christmas v Whinyates* (1863) 3 Sw & Tr 81.

15 *Re Leach* (1890) 63 LT 111. See also *Re Maley* (1887) 12 PD 134.

16 Probate is granted of a will in its actual form, where a part has been cut out: *Re Nunn* [1936] 1 All ER 555; *Re Everest* [1975] Fam 44, [1975] 1 All ER 672.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/C. REVOCATION BY DESTRUCTION/398. Presumption of intention.

398. Presumption of intention.

Where a will is found destroyed or mutilated, in a place in which the testator would naturally put it if he thought he had destroyed it, the presumption is that the testator destroyed it, and that the destruction was done with the intention to revoke¹, and, if there is a codicil, that the destruction took place after the execution of the codicil². This presumption applies, however, only *prima facie* and may be rebutted³. Similarly, if a will was last traced to the possession of the testator and is not forthcoming at his death⁴, there is a *prima facie* presumption, in the absence of circumstances tending to a contrary conclusion, that the testator destroyed it with the intention to revoke it⁵. The presumption may be rebutted by evidence, which, however, must be clear and satisfactory⁶. Recent declarations by a testator of satisfaction at having settled his affairs⁷, or of goodwill towards the persons benefited by the will, or of adherence to the will and to the contents of the will itself⁸, may be used for this purpose, but a declaration by the testator of adherence to a will may be answered by his declarations to a contrary effect⁹. The presumption may, it seems, also be rebutted by a consideration of the contents of the will itself¹⁰. The possibility that the will was destroyed without the privity or consent of the testator, or after his death, is a circumstance to be taken into account, but there is a presumption against fraudulent destruction¹¹.

It appears that the presumption that a will has been revoked if it cannot be found on the testator's death does not operate to revoke duly executed codicils which are found, even though they contain references to the will¹², and even where the will is known to have been destroyed by the testator¹³.

Where there is proof that the will was duly executed by a testator who afterwards became mentally disordered, and it is mutilated or not forthcoming, the burden of showing that it had been mutilated or destroyed by the testator when of sound mind is on the party alleging revocation, as the presumption of destruction with the intention to revoke does not apply in such a case¹⁴.

1 *Davies v Davies* (1753) 1 Lee 444; *Lambell v Lambell* (1831) 3 Hag Ecc 568; *Re Lewis* (1858) 1 Sw & Tr 31; *Magnesi v Hazelton* (1881) 44 LT 586.

2 *Christmas and Christmas v Whinyates* (1863) 3 Sw & Tr 81.

3 *Patten v Poulton* (1858) 1 Sw & Tr 55.

4 *Patten v Poulton* (1858) 1 Sw & Tr 55.

5 *Lillie v Lillie* (1829) 3 Hag Ecc 184; *Welch v Phillips* (1836) 1 Moo PCC 299; *Re Brown* (1858) 1 Sw & Tr 32; *Eckersley v Platt* (1866) LR 1 P & D 281; *Keen v Keen* (1873) LR 3 P & D 105; *Sugden v Lord St Leonards* (1876) 1 PD 154 at 217, CA; *Allan v Morrison* [1900] AC 604, PC; *Re Sykes, Drake v Sykes* (1907) 23 TLR 747, CA (not following the dictum of Lord Penzance in *Finch v Finch* (1867) LR 1 P & D 371); *Re Paget* (1913) 47 ILT 284. The presumption applies equally to a codicil: *Re Shaw* (1858) 1 Sw & Tr 62; *Re Debac, Sanger v Hart* (1897) 77 LT 374; *Re Donisthorpe, Churchward v Bowden and Churchward* [1947] WN 226. The presumption does not apply where the will is lost but was in the possession of someone other than the testator: *Chana v Chana* [2001] WTLR 205; *d'Eye v Avery* [2001] WTLR 227.

6 *Eckersley v Platt* (1866) LR 1 P & D 281. See also *Battyll v Lyles and Phillips* (1858) 4 Jur NS 718; *Re Yelland, Broadbent v Francis* (1975) 119 Sol Jo 562; *Re Davies, Panton v Jones* (1978) Times, 23 May.

7 *Whiteley v King* (1864) 17 CBNS 756.

8 *Keen v Keen* (1873) LR 3 P & D 105 at 107. See also *Saunders v Saunders* (1848) 6 Notes of Cases 518; *Patten v Poulton* (1858) 1 Sw & Tr 55; *Re Mackenzie* [1909] P 305; *Re Dickson, Dickson v Dickson* (1984) [2002] WTLR 1395, CA; *Jersey Society for the Prevention of Cruelty to Animals v Rees* 2001 JLR 506, (2001-02) 4 ITELR 294, Royal Ct Jer.

9 *Keen v Keen* (1873) LR 3 P & D 105; *Re Sykes, Drake v Sykes* (1907) 23 TLR 747, CA.

10 *Sugden v Lord St Leonards* (1876) 1 PD 154, CA.

11 *Finch v Finch* (1867) LR 1 P & D 371; *Allan v Morrison* [1900] AC 604, PC.

12 *Black v Jobling* (1869) LR 1 P & D 685; *Gardiner v Courthope* (1886) 12 PD 14 (where the codicil had not been destroyed by any of the means authorised by the Wills Act 1837 s 20). It is questionable, however, whether, if the will and codicil were closely connected, destruction of the will might not effect revocation of the codicil on the basis that the will and codicil together constituted one instrument and that destruction of a substantial part effected revocation of the whole.

13 *Re Turner* (1872) LR 2 P & D 403.

14 *Harris v Berrall* (1858) 1 Sw & Tr 153; *Sprigge v Sprigge* (1868) LR 1 P & D 608; *Benson v Benson* (1870) LR 2 P & D 172 at 176; *Re Hine* [1893] P 282; *Allan v Morrison* [1900] AC 604, PC; *Re Taylor, National and Provincial and Union Bank of England v Taylor* (1919) 64 Sol Jo 148.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/D. CONDITIONAL REVOCATION/399. Expressed or implied revocation.

D. CONDITIONAL REVOCATION

399. Expressed or implied revocation.

Where property has been disposed of in a will and the same property is again disposed of, either in a subsequent will or in a codicil, then, if there can be found, apart from the description of the subject matter of the gift, words expressly or impliedly effecting revocation, that revocation will stand, whatever the fate of the subsequent disposition may be¹. If, however, the only revocation is that which is to be gathered from the inconsistency of the subsequent disposition with the earlier one, then, if the second disposition fails to be effective for any reason, there will be no revocation². The whole question depends on the intention of the testator. If the will is revoked simply in order to make a gift in favour of another person, and it is clear that there is no intention to revoke it except for that purpose, the revocation is not effective if the gift is not effective³. It is immaterial whether the invalidity of the subsequent disposition is due to the want of capacity of the substituted donee or to a defect in the later gift⁴.

In all cases of revocation by destruction or obliteration, the question whether revocation is conditional is a question of fact⁵, to be considered in connection with the circumstances in which revocation occurred and the declarations of the testator with which it may have been accompanied⁶, which are accordingly admissible in evidence⁷. However, in cases of revocation by subsequent will or codicil, the question is one of construction⁸; revocation is not conditional unless it appears to be such on the construction of the subsequent will or codicil in the light of the extrinsic evidence which is admissible for the purposes of construction⁹. Extrinsic evidence of surrounding circumstances is admissible on the 'armchair principle'¹⁰. Direct extrinsic evidence of the testator's intention is admissible if either the relevant words are ambiguous on their face, or evidence other than evidence of the testator's intention shows that they are ambiguous when considered in the light of the surrounding circumstances¹¹.

- 1 *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653 at 671, HL, per Lord Dunedin (applying *Alexander v Kirkpatrick* (1874) LR 2 Sc & Div 397, HL). It was held that there was effective revocation in *Onions v Tyrer* (1716) 1 P Wms 343; *Tupper v Tupper* (1855) 1 K & J 665; *Quinn v Butler* (1868) LR 6 Eq 225; *Baker v Story* (1874) 31 LT 631.
- 2 *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653 at 671, HL, per Lord Dunedin (applying *Alexander v Kirkpatrick* (1874) LR 2 Sc & Div 397, HL). It was held in those two cases that there was no revocation. See also *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594; *Duguid v Fraser* (1886) 31 ChD 449; *Morley v Rennoldson* [1895] 1 Ch 449, CA; *Vencatanarayana Pillay v Subammal* (1915) 32 TLR 118, PC; *Re Davies, Thomas v Thomas-Davies* [1928] Ch 24; *Re Robinson, Lamb v Robinson* [1930] 2 Ch 332; and see *Doe d Murch v Marchant* (1843) 6 Man & G 813. As to the appointment of a guardian see *Ex p Earl of Ilchester* (1803) 7 Ves 348 at 372-373.
- 3 *Quinn v Butler* (1868) LR 6 Eq 225 at 227. As to dependent relative revocation see PARA 400 post.
- 4 *Vencatanarayana Pillay v Subammal* (1915) 32 TLR 118, PC; *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653 at 671, HL; *Re Robinson, Lamb v Robinson* [1930] 2 Ch 332.
- 5 See *Dixon v Treasury Solicitor* [1905] P 42.
- 6 *Powell v Powell* (1866) LR 1 P & D 209 at 212; *Cossey v Cossey* (1900) 82 LT 203 at 204. See also *Brooke v Kent* (1841) 3 Moo PCC 334 at 350.
- 7 Questions of this kind in the High Court come before the probate court, ie the division of the High Court in which the will is proved. This is the Family Division for non-contentious business and the Chancery Division for contentious business: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 74. As to such evidence in the probate court in ambiguous cases see PARA 306 ante.
- 8 *A-G v Lloyd* (1747) 1 Ves Sen 32 at 34; *Freel v Robinson* (1909) 18 OLR 651 at 654-655. As to courts of construction and courts of probate see PARAS 390 text and note 5 ante, 476 et seq post. See also *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384; *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514, [1967] 3 All ER 915, PC. For a case where a question of revocation which was a question of construction was determined in construction proceedings instead of probate proceedings see *Re Finnmere* [1992] 1 All ER 800, [1991] 1 WLR 793.
- 9 Thus where another donee is substituted, the revoked disposition is not revived by the fact that that donee fails to come into existence (*Nevill v Boddam* (1860) 28 Beav 554 at 558), or has not the capacity to take a benefit, as in the case of a devise to a charity before the Mortmain and Charitable Uses Act 1891 s 5 (repealed) (*French's Case* (1587) 1 Roll Abr 614; Devise (O) 4; *Roper v Radcliffe* (1714) 10 Mod Rep 230 at 233, HL; *Tupper v Tupper* (1855) 1 K & J 665 at 669; *Quinn v Butler* (1868) LR 6 Eq 225 at 227). See also *Re Murray, Murray v Murray* [1956] 2 All ER 353, [1956] 1 WLR 605 (where the invalidity of a substitutional name and arms clause in a codicil did not revive the original clause in the will). Where, however, there is no intention to deprive the original donee of benefit, but the codicil only varies the nature of the gift by imposing trusts on it and these trusts fail for perpetuity, the original gift stands: *Re Bernard's Settlement, Bernard v Jones* [1916] 1 Ch 552. Similarly, an earlier gift may remain effective where a subsequent will repeats a valid gift in an earlier will, but the gift in the later will is nullified by the will being witnessed by the beneficiary's spouse: *Re Finnmere* [1992] 1 All ER 800, [1991] 1 WLR 793. See also *Re Feis, Guillaume v Ritz-Remorf* [1964] Ch 106, [1963] 3 All ER 303 (where the revocation of the will as regards German property was held not conditional on separate arrangements made for that property being effective, so that, as those arrangements were ineffective, the property was undisposed of).
- 10 Ie the will must be construed in its context and in the light of the surrounding circumstances as the testator sat in his armchair: *Re Finnmere* [1992] 1 All ER 800 at 829-830, [1991] 1 WLR 793 at 825 per Judge Micklem sitting as a judge of the High Court. See also PARA 500 note 12 post. Where a gift is null and void under the Wills Act 1837 s 15 as a result of the will being witnessed by the beneficiary or the beneficiary's spouse (see PARA 343 ante), that does not preclude the court from looking at the words of the gift for the purposes of ascertaining the testator's intention when he made the document in which the gift is contained: *Re Finnmere* supra.
- 11 In relation to deaths on or after 1 January 1983 see the Administration of Justice Act 1982 s 21; and PARA 483 post. See also *Newton v Newton* (1861) 12 I Ch R 118 at 128-130.

400. Dependent relative revocation.

The revocation of a will may be relative to another disposition which has already been made or is intended to be made, and is so dependent on it that revocation is not intended unless that other disposition takes effect¹. Such a revocation is known as a 'dependent relative revocation', and, if from any cause the other disposition fails to take effect, the will remains operative as it was before the revocation². The doctrine also applies where the purported revocation is based on an assumption of fact which is false, the mistaken belief in that fact being the reason for the revocation³.

The question may thus arise in the case of destruction of a will as part of the act of making a fresh will, which is not in fact made⁴ or is ineffectually made for want of due execution⁵, or destruction in order to set up a prior will which needs revival⁶. In order to involve the doctrine of dependent relative revocation, it is not necessary that there should be direct evidence of the physical destruction of the will which it is sought to set up⁷. The question may also arise in the case of obliteration of the amount of a legacy, and the substitution, without proper formalities, of a different amount⁸, or obliteration and substitution, in a similar manner, of a different donee⁹ or other person¹⁰, or of a different event on which the gift is to take effect¹¹. If, however, a complete legacy has been obliterated and a new gift has been substituted which does not take effect (for example, for want of execution), there is (in the absence of other admissible evidence) insufficient evidence for the doctrine of dependent relative revocation to apply, and probate will be granted of the will with the parts obliterated blank¹². Where, however, some words in a legacy, as opposed to the whole legacy, have been obliterated and other words have been substituted for them, it may be possible to infer that the testator had no intention of revoking the original words unless the substituted words were effective, in which case the doctrine of dependent relative revocation applies and evidence outside the will itself will be admissible to show what the original words were¹³. Thus strips of paper covering the amounts of legacies may be removed to show what the original amounts were, in a case where the doctrine of dependent relative revocation applies¹⁴. Where it is not possible to infer that the testator intended to revoke the original words only if the words substituted were effective, the doctrine of dependent relevant revocation does not apply, and probate will be granted with the words obliterated blank¹⁵.

In all these and other cases, however, the question is whether the disposition revoked is intended not to operate whatever happens¹⁶, or is only to be revoked if the provisions of the substituted instrument operate in its stead¹⁷. The court must be satisfied that the testator did not intend to revoke the original will except conditionally, in so far as the other disposition could be set up¹⁸. Thus, if a will containing a general revocation clause on the face of it contains dispositions which are by some error incomplete, the revocation may be considered as conditional and the later will and the earlier will may both be admitted to probate, but with the exclusion of the revocation clause contained in the later will¹⁹. Again, where a later will containing a general revocation clause contains the same gift to a particular beneficiary as an earlier will, the gift in the earlier will being valid but that in the later one being invalid because the beneficiary's spouse witnessed the will, the revocation clause in the later will may be construed as not intended to revoke the gift in the earlier will in the event of failure of the gift in the later will²⁰; in such a case the evidence of the identical gifts appearing in both wills is sufficient to establish the testator's intentions in this regard without additional extrinsic evidence being required, and the revocation clause may be construed distributively as inoperative in relation to the gift which is the same in both wills while being effective in relation to other dispositions in the earlier will which were replaced by different dispositions in the later will²¹.

1 See *Ex p Earl of Ilchester* (1803) 7 Ves 348 at 372-373; *Re Irvine* [1919] 2 IR 485; *Re Addison* (1964) 108 Sol Jo 504.

2 In such a case the intention to revoke has only a conditional existence, the condition being the validity of the disposition intended to be substituted: *Powell v Powell* (1866) LR 1 P & D 209 at 212.

3 *Re Southerden, Adams v Southerden* [1925] P 177 (belief that widow would take whole estate on intestacy); *Re Carey* (1977) 121 Sol Jo 173 (belief that testator had nothing to leave); *Re Feis, Guillaume v Ritz-Remorf* [1964] Ch 106, [1963] 3 All ER 303 (revocation not founded on mistake).

4 *Re Appelbee* (1828) 1 Hag Ecc 143; *Re Eeles* (1862) 2 Sw & Tr 600; *Dixon v Treasury Solicitor* [1905] P 42; *Re Bromham, Wass v Treasury Solicitor* [1952] 1 All ER 110n; *Re Jones, Evans v Harries* [1976] Ch 200, [1976] 1 All ER 593, CA. See also note 18 infra.

5 *Hyde v Hyde* (1708) 1 Eq Cas Abr 409; *Onions v Tyrer* (1716) 1 P Wms 343 at 345; *Hide v Mason* (1734) 8 Vin Abr 140, Devise (R2) pl 17; *Dancer v Crabb* (1873) LR 3 P & D 98; *Re Irvin* (1908) 25 TLR 41; *Re Irvine* [1919] 2 IR 485; *West v West* [1921] 2 IR 34. Where a will is destroyed by the testator in the belief that he has validly executed another will, and the second will fails for want of due execution, the first will is not revoked, and evidence may be given of its contents: *Re Bunn, Durber v Bunn* (1926) 134 LT 669; *Re Davies, Russell v Delaney* [1951] 1 All ER 920.

6 *Powell v Powell* (1866) LR 1 P & D 209; *Re Weston* (1869) LR 1 P & D 633; *Welch and Freeman v Gardner* (1887) 51 JP 760; *Cossey v Cossey* (1900) 82 LT 203; *Re Bridgewater* [1965] 1 All ER 717, [1965] 1 WLR 416.

7 *Re Botting, Botting v Botting* [1951] 2 All ER 997.

8 *Winsor v Pratt* (1821) 2 Brod & Bing 650; *Kirke v Kirke* (1828) 4 Russ 435; *Brooke v Kent* (1841) 3 Moo PCC 334 at 350; *Soar v Dolman, Re Rippin* (1842) 3 Curt 121; *Locke v James* (1843) 11 M & W 901; *Re Nelson* (1872) IR 6 Eq 569; *Re Horsford* (1874) LR 3 P & D 211. Obliteration of part of the words describing the amount of the legacy may, however, be effectual: see *Re Nelson* supra (legacy of 'one hundred and fifty pounds', obliteration of 'one hundred and'); *Re Hamer* (1943) 60 TLR 168 (legacy of 'two hundred and fifty pounds'; obliteration of 'two hundred and'). To ascertain the state of the original instrument infra-red photography may be used: *Re Itter, Dedman v Godfrey* [1948] 2 All ER 1052; *Re Itter, Dedman v Godfrey* [1950] P 130, [1950] 1 All ER 68.

9 *Short d Gastrell v Smith* (1803) 4 East 419; *Re McCabe* (1873) LR 3 P & D 94. See also *Re Zimmer* (1924) 40 TLR 502 (where the doctrine was not applied, it not being clear that the testatrix would have allowed an erased word to stand if she had known that a substituted word would fail for want of attestation).

10 Eg where the person changed is the executor: *Re Parr* (1859) 6 Jur NS 56; *Re Harris* (1860) 1 Sw & Tr 536.

11 *Sturton v Whetlock* (1883) 52 LJP 29 (gift to children at 21 changed to gift at 25).

12 *Re Horsford* (1874) LR 3 P & D 211 (where the legacy was obliterated by a piece of paper on which a new, unattested bequest was written).

13 *Brooke v Kent* (1841) 3 Moo PCC 334; *Re McCabe* (1873) LR 3 P & D 94; *Re Horsford* (1874) LR 3 P & D 211; *Re Itter, Dedman v Godfrey* [1950] P 130, [1950] 1 All ER 68.

14 *Re Horsford* (1874) LR 3 P & D 211; *Re Itter, Dedman v Godfrey* [1950] P 130, [1950] 1 All ER 68. In *Re Gilbert* [1893] P 183, the court ordered the removal of blank paper which had been pasted over the back of a testamentary paper to see whether what had been written amounted to a revocation, but this case appears to be anomalous.

15 *Re Zimmer* (1924) 40 TLR 502.

16 See PARA 385 ante.

17 *Dancer v Crabb* (1873) LR 3 P & D 98 at 104; *Welch and Freeman v Gardner* (1887) 51 JP 760; *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653, HL; *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384 at 401. The question is not determined by the presence or absence of express words of revocation: *Ward v Van der Loeff, Burnyeat v Van der Loeff* supra at 667, 684.

18 *Dickinson v Swatman* (1860) 6 Jur NS 831 (as explained in *Powell v Powell* (1866) LR 1 P & D 209 at 213); *Re Mitcheson* (1863) 9 Jur NS 360; *Re Jones, Evans v Harries* [1976] Ch 200, [1976] 1 All ER 593, CA (where it was held that the intention to make a new will is not sufficient in itself to make revocation conditional). As to the weight given to the evidence see *Eckersley v Platt* (1866) LR 1 P & D 281 (witness interested in setting up earlier will); *Re Weston* (1869) LR 1 P & D 633 (testator's declarations not made at time of destruction); *Re Zimmer* (1924) 40 TLR 502. See also note 4 supra.

19 *Re Hope Brown* [1942] P 136, [1942] 2 All ER 176; *Re Cocke* [1960] 2 All ER 289, [1960] 1 WLR 491; *Re Allen* (1962) 106 Sol Jo 115.

20 *Re Crannis, Mansell v Crannis* (1978) 122 Sol Jo 489; *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793.

21 *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(7) REVOCATION/(iii) Voluntary Revocation/D. CONDITIONAL REVOCATION/401. Mistake.

401. Mistake.

A revocation is inoperative if it is shown¹ to be made on a mistake either of fact² or of law³, and is considered by the court not to be intended by the testator except conditionally on the mistaken assumption being correct⁴.

1 As to evidence in such cases cf para 399 ante.

2 *Campbell v French* (1797) 3 Ves 321 (belief that donee was dead); *Doe d Evans v Evans* (1839) 10 Ad & El 228 (belief that A died without issue). See, however, *Re Churchill, Taylor v Manchester University* [1917] 1 Ch 206 at 211 (where it was considered that these cases went too far, and a revocation by a codicil was held to be absolute, notwithstanding an erroneous belief of the testator that he had made an effective gift in his lifetime). See also *Re Plunkett Will Trusts, McCarthy v Dillon* [1964] IR 259 (mistake as to sale of property); *Re Carey* (1977) 121 Sol Jo 173 (mistake as to existence of estate). In *Thomas v Howell* (1874) LR 18 Eq 198, a gift based on an erroneous assumption as to the value of the estate was conditional on that value proving correct and failed.

3 Eg the belief that the prior will destroyed is no longer of use (*Scott v Scott* (1859) 1 Sw & Tr 258; *Beardsley v Lacey* (1897) 67 LJP 35), or is inoperative (*Lord John Thynne v Stanhope* (1822) 1 Add 52 at 53; *Giles v Warren* (1872) LR 2 P & D 401; *James v Shrimpton* (1876) 1 PD 431; *Re Thornton* (1889) 14 PD 82), or has already been revoked (*Clarkson v Clarkson* (1862) 2 Sw & Tr 497 at 500). Cf *Perrott v Perrott* (1811) 14 East 423 at 440 (appointment by deed); *Re Southerden, Adams v Southerden* [1925] P 177, CA (mistake as to effect of intestacy). Where the mistake is that another instrument is substituted for the destroyed instrument, the case falls within the principle of dependent relative revocation: see PARA 400 ante. See *Re Middleton* (1864) 3 Sw & Tr 583; *Re Finnemore* [1992] 1 All ER 800, [1991] 1 WLR 793 (mistake as to substituted will). See also *Stamford v White* [1901] P 46 (mistake as to effect of earlier settlement).

4 *Re Faris, Goddard v Overend (No 2)* [1911] 1 IR 469. See also *A-G v Lloyd* (1747) 1 Ves Sen 32 (questioned in *Thomas v Howell* (1874) LR 18 Eq 198 at 212 per Malins V-C). In *A-G v Ward* (1797) 3 Ves 327, *Re Faris, Goddard v Overend (No 2)* supra and *Re Feis, Guillaume v Ritz-Remorf* [1964] Ch 106, [1963] 3 All ER 303, the revocation was held not to be conditional in this respect, but absolute. See also PARA 400 text and note 3 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(8) REVIVAL/402. Methods of revival.

(8) REVIVAL

402. Methods of revival.

The only methods prescribed by statute by which a revoked will or codicil can be revived are either re-execution or the execution of a codicil showing an intention to revive, and, where a will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, the revival does not extend to the part first revoked unless an intention to the contrary is shown¹. It

follows that, where a will has been revoked by a later will, the revocation of the second will, whether by destruction or by codicil, does not have the effect of reviving the first will², and, where the first will has been partially revoked by the second, either expressly or impliedly in consequence of a different disposition of part of the testator's property, the cancellation of the second will does not revive the revoked part of the first³.

As the revocation by destruction of a revoking will fails to revive the first will, there is prima facie an intestacy⁴, but evidence may be given that the second will was revoked solely with the intention of validating the earlier will; the revocation of the second will is then treated as conditional, and, the condition not having been fulfilled, the doctrine of dependent relative revocation⁵ applies, and the second will is not revoked⁶. Where a will confirmed by a codicil is destroyed, but the codicil is left in being, the will cannot be admitted to probate; the codicil can be so admitted but it does not revive the will⁷. Where an earlier will which has been revoked by a later will is revived by a codicil, the later will stands unless expressly revoked or impliedly revoked by reason of dispositions inconsistent with its being contained in the codicil⁸. A codicil may revive in its altered state a will or previous codicil to which unattested additions have been made⁹. A will or codicil which has been revoked, or a part of it, may, without revival, have validity given to it by incorporation in a subsequent valid testamentary disposition¹⁰.

For the purpose of reviving a will, no precise form of words is necessary, nor need the reviving instrument be annexed to or indorsed on the will¹¹. For a will to be revived, however, it must be in existence; hence a will which has been destroyed cannot be revived¹².

1 Wills Act 1837 s 22. Under the old law there was a presumption that a revoked will was revived by the revocation of the revoking will: see *Harwood v Goodright* (1774) 1 Cowp 87 at 91; *Usticke v Bawden* (1824) 2 Add 116.

2 *Major and Mundy v Williams and Iles* (1843) 3 Curt 432; *Re Brown* (1858) 1 Sw & Tr 32. See also *Boulcott v Boulcott* (1853) 2 Drew 25 at 33.

3 *Stride v Sandford* (1853) 17 Jur 263; *Re Hodgkinson* [1893] P 339, CA. In *Re Howard, Howard v Treasury Solicitor* [1944] P 39, two wills of the same date, each revoking all former wills, although inconsistent and not admitted to probate, were held effective to revoke all earlier wills.

4 *Re Brown* (1858) 1 Sw & Tr 32.

5 See PARA 400 ante.

6 *Powell v Powell* (1866) LR 1 P & D 209 (overruling a dictum in *Dickinson v Swatman* (1860) 4 Sw & Tr 205).

7 *Re Formaniuk Estate, Pitz v Kasjan* (1963) 42 DLR (2d) 78, 44 WWR 686, Man CA.

8 See PARA 390 ante.

9 *Neate v Pickard* (1843) 2 Notes of Cases 406. The same rule applies in relation to republication: see PARA 405 post.

10 *Jorden v Jorden* (1843) 2 Notes of Cases 388. See also *Birkhead v Bowdoin* (1842) 2 Notes of Cases 66; *Re Lindsay* (1892) 8 TLR 507. As to probate in such cases see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105.

11 *Potter v Potter* (1750) 1 Ves Sen 437 at 442.

12 *Hale v Tokelove* (1850) 2 Rob Eccl 318 at 328; *Newton v Newton* (1861) 12 I Ch R 118; *Rogers and Andrews v Goodenough and Rogers* (1862) 2 Sw & Tr 342 at 350; *Re Steele* (1868) LR 1 P & D 575 at 576; *Re Reade* [1902] P 75; *Re Mulock* [1933] IR 171 at 191. If the will is lost without any evidence of its having been destroyed *animo revocandi* (ie with an intention to revoke), it is capable of being revived: *Re Watson* (1887) 13 VLR 599. Evidence of the contents of a destroyed will, if proved to have been duly executed, may, however, be given to show that it contained a clause revoking previous wills: see PARA 389 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(8) REVIVAL/403. Intention to revive.

403. Intention to revive.

Where a will which has been revoked is re-executed¹, the fact of re-execution shows that the testator intended to revive it. Where it is revived by codicil, the statutory requirement that there must be an intention to revive it must be satisfied. For this purpose, the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive it, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions showing, with reasonable certainty, the existence of the intention². The court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will better enable it to read the true sense of the words he has used³, and is able to admit evidence of the testator's intention if the words used are ambiguous on their face, or evidence other than evidence of his intention shows the words to be ambiguous in the light of surrounding circumstances⁴.

If a codicil refers by date to an existing will and expressly confirms it, that sufficiently shows an intention to revive it, the word 'confirm' being an apt word and expressing the meaning and having the operation of the word 'revive' which is used⁵ in the Wills Act 1837⁶. This is so even though the codicil itself takes effect on a contingency⁷ and the contingency has not happened at the death of the testator⁸. The intention of revival must, however, appear from the contents of the codicil⁹ or otherwise be shown by that document¹⁰. The mere physical annexation of a codicil to a revoked will is not sufficient to revive it¹¹, nor is a mere reference by a recital in the codicil to such a will by date¹².

1 Where a will has been revoked by cutting out the signature, pasting the signature on it in the original place is not a re-execution so as to revive the will: *Bell v Fothergill* (1870) LR 2 P & D 148. See also PARA 395 ante.

2 *Re Steele* (1868) LR 1 P & D 575 at 578.

3 *Re Steele* (1868) LR 1 P & D 575 at 576; *McLeod v McNab* [1891] AC 471 at 474, PC; *Re Davis* [1952] P 279, [1952] 2 All ER 509. See also *Lothian's Trustees v Back* 1918 SC 401; *Stewart v Maclaren* (1920) 57 SLR 148, HL (revocation of codicil not implied by confirmation of will and another codicil); *Re Mulock* [1933] IR 171 (where the cases were reviewed at length and extrinsic evidence was admitted).

4 In relation to deaths on or after 1 January 1983 see the Administration of Justice Act 1982 s 21; and PARA 483 post.

5 See the Wills Act 1837 s 22; and PARA 402 ante.

6 *McLeod v McNab* [1891] AC 471, PC. See also *Re Dyke* (1881) 6 PD 205; *Re Pearson, Rowling v Crowther* [1963] 3 All ER 763, [1963] 1 WLR 1358. This is especially so where the codicil, in addition to confirming the revoked will, refers expressly to certain of its terms with a view to rendering them effectual: *Re Van Cutsem* (1890) 63 LT 252; *Re Baker, Baker v Baker* [1929] 1 Ch 668; *Re Alford* (1939) 83 Sol Jo 566. 'Ratify' has the same effect, and it is sufficient to ratify the testator's will, without reference to date, where there is no doubt as to the will referred to, eg where the will has been revoked by marriage (*Neate v Pickard* (1843) 2 Notes of Cases 406), or where the codicil treats the will, so revoked, as subsisting (*Re Earl of Caithness* (1891) 7 TLR 354).

7 *Re Da Silva* (1861) 2 Sw & Tr 315; *Re Colley* (1879) 3 LR Ir 243 (where the testator declared that, in the event of the contingency not happening, the codicil was to be destroyed and not form part of the probate, but it was nevertheless admitted to probate).

8 *Re Bangham* (1876) 1 PD 429.

9 *Marsh v Marsh* (1860) 1 Sw & Tr 528, commented on in *Re Steele* (1868) LR 1 P & D 575.

10 *Re Harper* (1849) 7 Notes of Cases 44; *Re Terrible* (1858) 1 Sw & Tr 140 (where a will in favour of the wife was revoked by the testator's second marriage following her death, and was revived by a duly executed memorandum written on the will, substituting the name of the second wife).

11 *Marsh v Marsh* (1860) 1 Sw & Tr 528.

12 *Re Dennis* [1891] P 326. A mere statement in a codicil that it is a codicil to a revoked will is not, it seems, sufficient to revive the will, although it would have had this effect before the Wills Act 1837. That Act requires some further indication of the testator's intention: *Re Steele* (1868) LR 1 P & D 575 at 577-578 (explaining *Payne and Meredith v Trappes* (1847) 1 Rob Eccl 583); *Re Reynolds* (1873) LR 3 P & D 35; *Goldie v Adam* [1938] P 85, [1938] 1 All ER 586.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(8) REVIVAL/404. Reference to will by date.

404. Reference to will by date.

A codicil is part of the testamentary disposition of the testator and, when a will is revived, then, in the absence of a contrary intention, the revival extends to the will with all previous codicils¹. The mere fact that a testator describes his will by reference to its original date does not exclude the inference that the will thus referred to is the will as modified by a previous codicil². Where, however, a codicil in its original form was ineffectual, it will not be revived and made effectual without distinct reference to it³.

Where a codicil purports to revive a will without mentioning its date, evidence of facts and circumstances outside the codicil is admissible for the purpose of identifying it⁴, and, only if the result is to disclose an ambiguity, is evidence of the testator's intention allowed⁵.

Where the will is referred to by date, extrinsic evidence that the date was stated erroneously is inadmissible⁶, but, if it appears on a comparison of successive testamentary instruments that the date is a mistake, it will be disregarded⁷. This will not, however, be done where the mind of the draftsman, which must be treated as that of the testator, was actually applied to the provisions of the wrong document, and he based the reviving codicil on it⁸.

1 *Crosbie v Macdoul* (1799) 4 Ves 610; *Green v Tribe* (1878) 9 ChD 231; *Stewart v Maclaren* (1920) 57 SLR 531, HL. See also *Re M'Cabe* (1862) 2 Sw & Tr 474; *Re De la Saussaye* (1873) LR 3 P & D 42 at 44. As to the effect of confirmation by codicil see PARAS 405-407 post. For cases where the revival was confined to the original will see *Re Reynolds* (1873) LR 3 P & D 35; *McLeod v McNab* [1891] AC 471, PC; *French v Hoey* [1899] 2 IR 472. See also *Re Carritt* (1892) 66 LT 379.

2 *McLeod v McNab* [1891] AC 471, PC.

3 *Burton v Newbery* (1875) 1 ChD 234 (donee an attesting witness), explained in *Green v Tribe* (1878) 9 ChD 231.

4 See *Re M'Cabe* (1862) 2 Sw & Tr 474 (where a revoked will which had been revived in a duly attested letter was found after the testator's death, with two codicils in a sealed envelope indorsed by him with date of sealing and his initials).

5 *Paton v Ormerod* [1892] P 247 (where there was no such ambiguity as to admit declarations by the testatrix of her intention). As to the admissibility of evidence of the testator's intention in resolving ambiguity generally see PARAS 506-507 post.

6 *Re Chapman* (1844) 1 Rob Eccl 1; *Payne and Meredith v Trappes* (1847) 1 Rob Eccl 583. For a review of the cases on admission of extrinsic evidence see *Re Mulock* [1933] IR 171 at 193 et seq.

7 Thus where an earlier will has been revoked by a later will, and afterwards a codicil is made expressed to be a codicil to and to confirm the earlier will, but it is apparent that the reference should have been to the later will, this is treated as a mere error of description; the earlier will is not revived and probate is granted of the later will and of the codicil, with the reference to the earlier will omitted from the codicil: *Re Brown, Quincey v Quincey* (1846) 11 Jur 111; *Re Whatman* (1864) 34 LJP & A 17; *Re Steele, Re May, Re Wilson* (1868) LR 1 P & D 575; *Re Law* (1869) 21 LT 399; *Re Anderson* (1870) 39 LJP & M 55; *Re Ince* (1877) 2 PD 111; *Re Turner* (1891) 64 LT 805; *Re Lady Isabella Gordon* [1892] P 228; *Jane v Jane* (1917) 33 TLR 389; *Goldie v Adam* [1938] P 85, [1938] 1 All ER 586; *Re Dear* [1975] 2 NZLR 254, NZ CA.

8 *Re Stedham, Re Dyke* (1881) 6 PD 205; *Re Chilcott* [1897] P 223. See also *Re Lewis* (1860) 25 JP 280; and PARA 390 ante. The decisions in *Re Stedham, Re Dyke* supra and *Re Chilcott* supra were, however, distinguished in *Goldie v Adam* [1938] P 85, [1938] 1 All ER 586 (where the earlier will was held not to be revived, the conclusion in all the circumstances being that the testator did not intend to revive it), and not followed in *Re Dear* [1975] 2 NZLR 254, NZ CA. In *Re Carleton* [1915] 2 IR 9, a duly executed codicil which, by mistake, was indorsed on and referred to an earlier revoked will, instead of a later will, was held to revive it and all three documents were admitted to probate. Cf *Re Snowden* (1896) 75 LT 279 (which was decided in the contrary sense). See also *Stewart v Maclaren* (1920) 57 SLR 531, HL; *Re Mulock* [1933] IR 171. In *Re Mardon* [1944] P 109, [1944] 2 All ER 397, where a codicil showed an intention to revive part of a revoked will but the revocation had been forgotten, it was held that the part in question had been revived.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(9) REPUBLICATION/405. Nature and methods of republication.

(9) REPUBLICATION

405. Nature and methods of republication.

The difference between revival and republication¹ is that, whereas revival restores a will or codicil which has been revoked, republication merely confirms an unrevoked testamentary instrument². There can be no republication without re-execution³. The re-execution may take the form of actual re-execution of the will with the necessary formalities⁴, or be effected by means of a codicil⁵. For a codicil to have the effect of republishing a will it must contain some reference to it, and, if it does not, there will be no republication⁶; but no precise form of words is necessary⁷, and the codicil need not expressly republish the will⁸. Thus if the instrument is described as 'codicil to my will' without in terms confirming it⁹, or if the codicil is written on the same paper as the will and refers to 'my executors above named', it operates as a republication of the will¹⁰.

1 The term 'republication' derives from 'publication', the now obsolete procedure whereby the testator made a declaration in the presence of witnesses that the instrument produced to them was his will. This procedure has been superseded by attestation by two witnesses; every will executed in the manner required by the Wills Act 1837 s 9 (as substituted) (see PARA 362 ante) is valid without any other publication: s 13. Republication is not, therefore, a strictly accurate term for what is now the confirming of a will by re-execution of the will or by making a codicil, but it has persisted as the term for it: see *Berkeley v Berkeley* [1946] AC 555 at 575-576, [1946] 2 All ER 154 at 163, HL. As to the effect of republication see PARA 406 post.

2 In *Re Turner's Estate* [2003] BCSC 1226, [2004] WTLR 1467, BC Sup Ct, it was held, citing *Re Barke* (1845) 4 Notes of Cases 44 (see PARA 406 note 3 post), that an invalidly executed will could be republished.

3 *Barnes v Crowe* (1792) 1 Ves 486 at 497. For methods of revival see PARA 402 ante.

4 As to the formalities of execution see PARA 351 et seq ante.

5 *Duppa v Mayo* (1669) 1 Wms Saund 275; *Barnes v Crowe* (1792) 1 Ves 486; *Re Smith, Bilke v Roper* (1890) 45 ChD 632.

6 *Re Smith, Bilke v Roper* (1890) 45 ChD 632.

7 *Potter v Potter* (1750) 1 Ves Sen 437 at 444.

8 *Barnes v Crowe* (1792) 1 Ves 486; *Pigott v Waller* (1802) 7 Ves 98 at 120; *Grealey v Sampson* [1917] 1 IR 286, Ir CA.

9 *Skinner v Ogle* (1845) 9 Jur 432; *Re Taylor, Whitby v Highton* (1888) 57 LJ Ch 430. See also *Acherley v Vernon* (1725) 3 Bro Parl Cas 85 at 91, HL; *Rowley v Eyton* (1817) 2 Mer 128 (where the codicil referred to the will, although the report does not say so: see *Re Smith, Bilke v Roper* (1890) 45 ChD 632 at 637); *Yarnold v*

Wallis (1840) 4 Y & C Ex 160; *Doe d York v Walker* (1844) 12 M & W 591; *Re Champion, Dudley v Champion* [1893] 1 Ch 101, CA (where, however, there was express confirmation).

10 *Serocold v Hemming* (1758) 2 Lee 490 (cited in *Re Smith, Bilke v Roper* (1890) 45 ChD 632 at 637). Cf the case of a codicil executed for a limited purpose only: see PARA 407 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(9) REPUBLICATION/406. Date of will shifted by republication.

406. Date of will shifted by republication.

The effect of republishing a will is for many purposes to shift its date to the date of the republishing instrument¹, as if the testator at that date had made a will in the words of the will so republished², together with any unattested additions to the will or to any intervening codicils, provided that the alterations or additions form part of the former testamentary paper³, and together with any codicils effecting alterations⁴, except such codicils as are inoperative without being themselves expressly confirmed or incorporated⁵ or are expressly or impliedly revoked⁶. The will may thus acquire a force or efficiency which it did not previously possess⁷. In particular, where property is given by a generic description, so as to be capable of increase or diminution and not so as to identify a specific thing and that thing only, the description is prima facie referred not to the date of the will⁸, but to the date of the codicil⁹, so as to pass all the testator's interest in the property then falling within the description¹⁰.

1 *Doe d York v Walker* (1844) 12 M & W 591 at 600; *Grealey v Sampson* [1917] 1 IR 286, Ir CA; *Goonewardene v Goonewardene* [1931] AC 647, HL. As to the methods of effecting republication see PARA 353 ante.

2 *Rogers v Pittis* (1822) 1 Add 30 at 38; *Hamilton v Carroll* (1839) 1 I Eq R 175; *Winter v Winter* (1846) 5 Hare 306; *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726, CA; *Re Malcolm, Marjoribanks v Malcolm* (1923) 156 LT Jo 361; *Re Hardyman, Teesdale v McClintock* [1925] Ch 287; *Re Reeves, Reeves v Pawson* [1928] Ch 351. In *Re Mellor, Dodgson v Ashworth* (1912) 28 TLR 473, a legacy given to an executor by the will passed to another executor substituted by a codicil. In *Re Yates, Singleton v Povah* (1922) 128 LT 619, a legacy given by the will was increased to the amount mentioned in the codicil.

3 *Re Barke* (1845) 4 Notes of Cases 44; *Re Tegg* (1846) 4 Notes of Cases 531. See also PARA 402 note 9 ante. It appears that an addition or a separate paper cannot be republished by a later codicil, but see PARA 405 note 2 ante.

4 *Winter v Winter* (1846) 5 Hare 306 at 312; *Re Rayer, Rayer v Rayer* [1903] 1 Ch 685; *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726 at 734, CA; *Re Taylor, Dale v Dale* [1909] WN 59; *Re Picton, Porter v Jones* [1944] Ch 303; *Re Dack's Will Trusts, Barclays Bank Ltd v Tracey* (1964) 114 L Jo 656. See also *Re De la Saussaye* (1783) LR 3 P & D 42; *Crosbie v Macdoul* (1779) 4 Ves 610 at 616; *Green v Tribe* (1878) 9 ChD 231 at 235; *Follett v Pettman* (1883) 23 ChD 337. The question whether all or some only of a series of testamentary instruments are to be treated as the testator's will is to be decided in accordance with his intention as collected from all the circumstances of the case: see *Smith v Cunningham* (1823) 1 Add 448 (only some codicils ratified with the will, but all admitted to probate); *Greenough v Martin* (1824) 2 Add 239 (three intermediate codicils not admitted); *McLeod v McNab* [1891] AC 471, PC (intermediate codicil held to be revoked). A codicil may incorporate documents not in existence at the date of the will but referred to in the will as if in existence, and actually so at the date of the codicil: *Re Rendle* (1899) 68 LJP 125; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105. As to the revival of a revoked will see PARA 402 ante. As to the exercise of a special power conferred after the date of the will see *Cowper v Mantell* (1856) 22 Beav 223 at 230 (power not executed); and as to a power already conferred, but exercisable on an event after the date of the will see *Re Blackburn, Smiles v Blackburn* (1889) 43 ChD 75 (power executed). See also POWERS vol 36(2) (Reissue) PARA 332 et seq.

5 As to the need for express incorporation see PARA 404 text and note 3 ante.

6 *McLeod v McNab* [1891] AC 471, PC.

7 *Re Tredgold, Midland Bank Executor and Trustee Co Ltd v Tredgold* [1943] Ch 69 at 72, [1943] 1 All ER 120 at 122 (overruled by *Berkeley v Berkeley* [1946] AC 555, [1946] 2 All ER 154, HL, on the construction of the statute in question in that case).

8 It is assumed that the rule of construction in the Wills Act 1837 s 24 (see PARA 573 post), referring descriptions of property to the death of the testator, is excluded or is otherwise not applicable.

9 *Doe d York v Walker* (1844) 12 M & W 591; *Lady Langdale v Briggs* (1855) 3 Sm & G 246 at 252; *Re Champion, Dudley v Champion* [1893] 1 Ch 101, CA; *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726 at 734, CA.

10 *Emuss v Smith* (1848) 2 De G & Sm 722 (where a codicil was not effective to pass after-acquired freehold); *Re Pyle, Pyle v Pyle* [1895] 1 Ch 724 (where the testator's interest was transferred to the purchase money where an option to purchase was granted after the will but at the same time as the codicil was executed); *Steele v Steele* [1913] 1 IR 292, Ir CA. Cf *Pattinson v Pattinson* (1832) 1 My & K 12; *Macdonald v Irvine* (1878) 8 ChD 101 at 108, CA (where the legacies were adeemed although the descriptions were accurate when the wills were made).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(9) REPUBLICATION/407. Purposes for which date not shifted.

407. Purposes for which date not shifted.

The original effect of the will and the operative intermediate codicils is not prejudiced by republication¹, and republication does not necessarily make the will operate for all purposes as if it had been originally made at the date of the republishing instrument, for a contrary intention may be shown². Whether a codicil is part of a will, or republishes it, or incorporates or reiterates it, or brings up the date of the will to its own date depends on the particular case³, and the testator's intention is not to be defeated by treating the will as brought up to the date of the codicil⁴. Republication does not revive a legacy which has been revoked⁵, or adeemed or satisfied⁶, nor does it revive a gift which has lapsed⁷, or substitute a new legatee for one named in the will where the description used may apply to different persons at different times⁸; for the codicil can only act on the will as it existed at the time of republication and at that time the legacy revoked, adeemed or satisfied formed no part of it⁹. Moreover, it seems that republication need not affect conditions attached to a gift¹⁰, but it does not give effect to a condition shown to have been dispensed with by the testator before the date of the codicil¹¹. Where the purpose of a will is limited to particular property, the mere making of a codicil will not enlarge its scope¹², nor does a codicil executed for a limited purpose only and not purporting to confirm the will or bring its terms up to its own date have the effect of republishing it¹³.

The date of original execution of the will remains as a factor for determining the construction of it, as, for example, where it is necessary to determine the date to which expressions of time occurring in the will are referable¹⁴. The date when a will is 'made' may depend on the construction of a particular statute¹⁵.

1 *Stilwell v Mellersh* (1851) 20 LJ Ch 356. In *Re Beirnsstein, Barnett v Beirnsstein* [1925] Ch 12, republication of the will did not extend the meaning of 'mortgage' as used in it.

2 *Bowes v Bowes* (1801) 2 Bos & P 500, HL; *Goodtitle d Woodhouse v Meredith* (1813) 2 M & S 5 at 14; *Re Farrer's Estate* (1858) 8 ICLR 370; *Hopwood v Hopwood* (1859) 7 HL Cas 728; *Earl of Mountcashell v Smyth* [1895] 1 IR 346, Ir CA.

3 *Re Elcom, Layborn v Grover Wright* [1894] 1 Ch 303 at 309, CA.

4 *Doe d Biddulph v Hole* (1850) 15 QB 848 at 858; *Re Moore, Long v Moore* [1907] 1 IR 315; *Re Heath's Will Trusts, Hamilton v Lloyds Bank Ltd* [1949] Ch 170, [1949] 1 All ER 199. See also *Re Sebag-Montefiore, Sebag-Montefiore v Alliance Assurance Co Ltd* [1944] Ch 331, [1944] 1 All ER 672, CA (overruled on the construction of the statute there in question in *Berkeley v Berkeley* [1946] AC 555, [1946] 2 All ER 154, HL).

5 As to revocation see PARA 387 ante.

6 *Cowper v Mantell* (1856) 22 Beav 223; *Sidney v Sidney* (1873) LR 17 Eq 65. In accordance with this principle a legacy is not revived if it has been adeemed or satisfied under the presumption against double portions: *Izard v Hurst* (1698) Freem Ch 224; *Drinkwater v Falconer* (1755) 2 Ves Sen 623 at 626; *Monck v Lord Monck* (1810) 1 Ball & B 298; *Booker v Allen* (1831) 2 Russ & M 270; *Powys v Mansfield* (1837) 3 My & Cr 359 at 376; *Montague v Montague* (1852) 15 Beav 565; *Hopwood v Hopwood* (1859) 7 HL Cas 728. As to ademption see PARAS 445-449 post. If it is doubtful whether the doctrine of ademption is to be applied, the existence of a codicil is important: *Re Aynsley*, *Kyrle v Turner* [1914] 2 Ch 422 (on appeal [1915] Ch 172, CA); *Re Warren*, *Warren v Warren* [1932] 1 Ch 42 (distinguishing *Powys v Mansfield* (1837) 3 My & Cr 359). See also *Grealey v Sampson* [1917] 1 IR 286, Ir CA. Exceptionally, republication by a codicil executed after 31 December 1925 prevented the ademption of a gift of an undivided share of land in a will executed before 1 January 1926, where the gift was one which might (without the republication) have been adeemed as a result of the Law of Property Act 1925 converting the undivided share into a notional interest in proceeds of sale, the land being still unsold at the testator's death (*Re Warren*, *Warren v Warren* supra); by contrast, republication did not prevent ademption where an actual conversion into cash had occurred when coal mines were nationalised and their place taken by compensation money (*Re Galway's Will Trusts*, *Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419).

7 *Hutcheson v Hammond* (1790) 3 Bro CC 128; *Doe d Turner v Kett* (1792) 4 Term Rep 601; *Winter v Winter* (1846) 5 Hare 306. As to lapse see PARA 450 et seq post.

8 *Drinkwater v Falconer* (1755) 2 Ves Sen 623 at 626; *Doe d Turner v Kett* (1792) 4 Term Rep 601; *Stilwell v Mellersh* (1851) 20 LJ Ch 356 at 361-362; *Re Park*, *Bott v Chester* [1910] 2 Ch 322 at 328. See also *Anon* (undated), cited in 1 My & K at 14 (bequest to testator's six children; one died, but another was born before republication; the last child was held to be excluded). The authorities are not, however, uniform; for decisions to the contrary see *Perkins v Micklethwaite* (1714) 1 P Wms 274 at 275 (gift to 'youngest son J'; J died in testator's lifetime, but another son J was born afterwards and before the date of the codicil and was held entitled to take); *Re Donald*, *Moore v Somerset* [1909] 2 Ch 410 ('to whom I have given legacies' held to include legatees by codicil), not following *Anon* supra. In *Re Hardyman*, *Teesdale v McClintock* [1925] Ch 287, the testatrix by her will gave an interest in a legacy to her cousin's 'wife'; the wife died and after her death the testatrix made a codicil republishing her will; the cousin then married again and it was held that the second wife was entitled to the interest in the legacy; this case seems to have turned largely on the fact that at the date of the codicil the testatrix knew that the cousin's first wife was dead. It appears doubtful whether the decisions in *Perkins v Micklethwaite* supra, *Re Donald*, *Moore v Somerset* supra and *Re Hardyman*, *Teesdale v McClintock* supra are really reconcilable with what it is submitted is the true principle, as stated in the text.

9 *Powys v Mansfield* (1837) 3 My & Cr 359 at 376 per Lord Cottenham; cited with approval in *Hopwood v Hopwood* (1859) 7 HL Cas 728; and followed in *Re Galway's Will Trusts*, *Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419.

10 *Stilwell v Mellersh* (1851) 20 LJ Ch 356 (advances 'already' made to be brought into hotchpot; advance after date of will not affected); *Re Park*, *Bott v Chester* [1910] 2 Ch 322 at 327-328 (condition as to marriage with consent); but see *Re Rayer*, *Rayer v Rayer* [1903] 1 Ch 685 (direction that annuities were to be free of deduction except legacy duty and income tax; held that effect of republication was that annuitants bore duties substituted for legacy duty by an Act passed before the codicil); *Wedgwood v Denton* (1871) LR 12 Eq 290 (condition relating to residence during specified lease; renewal of lease before republication); *Re Taylor*, *Dale v Dale* [1909] WN 59 (effect on gift over to issue of deceased children).

11 *Violett v Brookman* (1857) 26 LJ Ch 308; cf *Cooper v Cooper* (1856) 6 LJ Ch R 217 at 223. See also PARA 435 post.

12 *Re Taylor*, *Whitby v Highton* (1888) 57 LJ Ch 430.

13 *Bowes v Bowes* (1801) 2 Bos & P 500, HL; *Monypenny v Bristow* (1832) 2 Russ & M 117; *Hughes v Turner* (1835) 3 My & K 666; *Ashley v Waugh* (1839) 4 Jur 572. As to the conditions necessary for republication see PARA 405 ante.

14 *Earl of Mountcashell v Smyth* [1895] 1 IR 346 at 360, Ir CA; *Re Moore*, *Long v Moore* [1907] 1 IR 315 at 320; *Re Heath's Will Trusts*, *Hamilton v Lloyds Bank Ltd* [1949] Ch 170, [1949] 1 All ER 199.

15 The Wills Act 1837 s 34 provides that, for the purposes of that Act, a will made before that Act and republished afterwards is deemed to have been made at the time of republication. A will made before the Married Women's Reversionary Interests Act 1857 and republished by codicil afterwards was, however, held to have been made at the date of the will and not at the date of the codicil (*Re Elcom*, *Layborn v Grover Wright* [1894] 1 Ch 303); and a charitable devise was held not to have been invalidated under the law of mortmain (repealed: see the Charities Act 1960 s 38; and CHARITIES vol 8 (2010) PARA 83), because the will in which it was

contained was republished by a codicil made within 12 months of the testator's death (*Re Moore, Long v Moore* [1907] 1 IR 315). See also *Rolfe v Perry* (1863) 3 De GJ & Sm 481 (will made before the Real Estate Charges Act 1854, but coming into operation after its commencement). The changes made by the Family Law Reform Act 1969 s 15 (repealed) (see PARA 643 post) and the Family Law Reform Act 1987 s 1(1) (see PARA 644 post) to the construction of words descriptive of relationship in wills do not apply to wills made before the respective commencement dates of those provisions, including wills made before the commencement date and confirmed by a codicil after it: see the Family Law Reform Act 1969 s 15(8) (repealed); and the Family Law Reform Act 1987 s 19(7).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/1. TESTAMENTARY DISPOSITION/(10) RECTIFICATION/408. Rectification.

(10) RECTIFICATION

408. Rectification.

Prior to 1 January 1983¹ there was no jurisdiction to rectify a will², but there was a jurisdiction to omit words from the probate if it was proved that they had been included through fraud or by mistake³. If, however, a court is satisfied that the will of a testator who dies on or after that date is so expressed that it fails to carry out his intentions in consequence of a clerical error, or of a failure to understand his instructions, it may order that the will be rectified so as to carry out his intentions⁴. 'Clerical error' means an inadvertent error made in the process of recording the intended words of the testator in the drafting or the transcription of his will⁵. The introduction of a clause which is inconsistent with the testator's instructions in circumstances in which the draftsman has not applied his mind to its significance or effect is also a 'clerical error' for this purpose⁶. Although the standard of proof required in a claim for rectification of a will is that the court should be satisfied on the balance of probability, the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary⁷.

No application for an order for rectification may be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out⁸, except with the permission of the court⁹. In considering whether to give permission to apply out of time, the court will have regard to the guidelines¹⁰ for applications for late leave under the Inheritance (Provision for Family and Dependants) Act 1975¹¹. If no probate action has been commenced, an application for rectification may be made to a district judge or registrar¹². The application must be supported by an affidavit, setting out the grounds of the application, together with such evidence as can be adduced as to the testator's intentions and as to whichever of the following matters are in issue, namely in what respects the testator's intentions were not understood or the nature of any clerical error¹³. Unless otherwise directed, notice of the application must be given to every person having an interest under the will whose interest might be prejudiced, or such other person as might be prejudiced, by the rectification applied for and any comments in writing by any such person must be exhibited to the affidavit in support of the application¹⁴. If the district judge or registrar is satisfied that, subject to any direction to the contrary, notice has been so given to every such person, and that the application is unopposed, he may order that the will be rectified accordingly¹⁵.

The personal representatives of a deceased person are not liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order for rectification after the end of that period¹⁶. This exemption does not, however, prejudice any power to recover, by reason of the making of an order for rectification, any part of the estate so distributed¹⁷.

1 le the date on which the Administration of Justice Act 1982 s 20 came into force: see s 76(11).

2 *Harter v Harter* (1873) LR 3 P & D 11; *Collins v Elstone* [1893] P 1; *Re Bacharach's Will Trusts, Minden v Bacharach* [1959] Ch 245 at 249, [1958] 3 All ER 618 at 620.

3 *Re Horrocks, Taylor v Kershaw* [1939] P 198, [1939] 1 All ER 579, CA; *Re Morris, Lloyds Bank Ltd v Peake* [1971] P 62, [1970] 1 All ER 1057; *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256; *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037, [1976] 1 WLR 161. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 141. As to correction of mistakes as a matter of construction of the will see PARA 477 post.

4 Administration of Justice Act 1982 s 20(1). For the general law of rectification of instruments other than wills, much of which is applicable to this statutory jurisdiction see EQUITY vol 16(2) (Reissue) PARA 604; MISTAKE vol 77 (2010) PARA 57 et seq. To obtain rectification it is not enough to show that a mistake has been made; it is also necessary to be able to show what would have been intended if the mistake had not been made: *Racal Group Services Ltd v Ashmore* [1995] STC 1151, CA (covenanted payment to charity). The main difference between the power of rectifying wills and that of rectifying other instruments is that in the case of wills there is no power to rectify where wording was included under a misunderstanding of their legal effect: cf *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483 (rectification of a non-testamentary instrument in this manner). For cases where on the facts rectification of a will was granted see eg *Re Munday, Wong v Wong* [2003] WTLR 1161; *Re Vautier's Estate* 2000 JLR 351, (2000-01) 3 IETLR 566, Royal Ct Jer (mistaken signing of wrong will cured by rectification). For cases where on the facts it was refused see eg *Re Grattan, Grattan v McNaughton* [2001] WTLR 1305; *Bell v Georgiou* [2002] EWHC 1080 (Ch), [2002] All ER (D) 433 (May), [2002] WTLR 1105.

5 *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch 412, [1992] 3 All ER 204 (failure by solicitor to repeat in a later will a clause in an earlier will which the testator intended to have included; will rectified to include it). A clerical error for this purpose may be one made by the testator himself, a solicitor preparing the will, the typist of the will, or anyone else involved: see *Re Williams, Wiles v Madgin* [1985] 1 All ER 964 at 969, [1985] 1 WLR 905 at 911-912 per Nicholls J.

6 *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676 (will rectified to delete the clause).

7 *Re Segelman* [1996] Ch 171 at 184, [1995] 3 All ER 676 at 684 per Chadwick J; approved in *Walker v Geo H Medlicott & Son* [1999] 1 All ER 685 at 690, [1999] 1 WLR 727 at 731, CA, per Sir Christopher Slade.

8 In considering when representation was first taken out, a grant limited to settled land (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 229 et seq) or to trust property (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 227) is to be left out of account, and a grant limited to real estate or to personal estate (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 228) is to be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time: Administration of Justice Act 1982 s 20(4). For the procedure relating to claims for the rectification of a will see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 298 ante.

9 Ibid s 20(2).

10 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 698. See also *Re Salmon, Coard v National Westminster Bank* [1981] Ch 167, [1980] 3 All ER 532; *Escritt v Escritt* (1981) [1982] 3 FLR 280 (no late leave where the applicant had made a fully informed decision not to claim and subsequently had a change of mind).

11 *Chittock v Stevens* [2000] WTLR 643.

12 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(1) (amended by SI 1991/1876). In relation to the contentious procedure, a claim for rectification of a will is not a probate claim for the purposes of CPR Pt 57 (and so the requirement of CPR 57.3 that the claim be by Part 7 claim form does not apply). Where proceedings for rectification are brought and the grant has not been lodged in court, it must be lodged (*Practice Direction--Probate* PD 57 para 10), and all the personal representatives must be joined as parties (CPR 57.12(2)). As to the CPR see CIVIL PROCEDURE vol 11 (2009) PARA 30 et seq.

A copy of an order for rectification of a will must be sent to the Principal Registry of the Family Division for filing; and a memorandum of the order must be endorsed on or permanently annexed to the grant under which the estate is administered: *Practice Direction--Probate* PD 57 para 11.

13 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(2).

14 Ibid r 55(3) (amended by SI 1998/1903).

15 Non-Contentious Probate Rules 1987, SI 1987/2024, r 55(4) (amended by SI 1991/1876).

16 Administration of Justice Act 1982 s 20(3).

17 Ibid s 20(3). As to such recovery see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 514 et seq.

UPDATE

408 Rectification

NOTE 4--See *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941 (rectification denied where testator's attempt to mitigate the effect of inheritance tax failed).

NOTE 7--See *Re Craig; Price v Craig* [2006] EWHC 2561 (Ch), (2006) 9 ITELR 393 (testator's true intentions clear from attendance notes of his solicitors; rectification granted).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(1) INTRODUCTION/409. Creation of interests.

2. INCIDENTS AND FAILURE OF GIFTS

(1) INTRODUCTION

409. Creation of interests.

The power of disposition by will is not at the testator's caprice, but extends only to the creation of those interests which are recognised by law and to no other¹. The interest created need not necessarily be the interest of a sole donee vesting immediately in the whole of the property which is the subject of the gift; property may be given to persons as joint tenants or as tenants in common² or as a class³, and future and successive interests may be created⁴. A condition may be attached to the gift⁵, or the interest may take the form of an option, exercisable only on the giving of consideration⁶. The donee may be given the right to choose between two or more pieces of property⁷; or it is possible to make a gift of a specific quantity out of some larger asset which constitutes a homogeneous mass, such as a bank account or a holding of shares in a company⁸. Incorporeal interests may be created, such as rentcharges⁹ and easements¹⁰.

1 *Soulle v Gerrard* (1596) Cro Eliz 525; *Roe d Dodson v Grew* (1767) Wilm 272 at 274 commenting on the phrase 'at his will and pleasure' in 32 Hen 8 c 1 (Wills) (1540); *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 24; *Re Elliot, Kelly v Elliot* [1896] 2 Ch 353 at 356. As to property disposable by will see PARA 327 et seq ante.

2 *Willing v Baine* (1731) 3 P Wms 113 at 115; *Ritchie's Trustees v M'Donald* 1915 SC 501 (where a gift to two persons equally for their lives, with a gift over on the death of the survivor, was held to be a joint tenancy). As to the creation of joint tenancies and tenancies in common see further PARA 677 et seq post; and as to lapse where there is a gift to joint tenants or tenants in common see PARA 463 post.

3 See PARAS 465, 593 et seq post. As to lapse in the case of class gifts see PARA 464 post; and as to the rules of convenience for ascertaining a class see PARA 595 et seq post.

4 See PARAS 411-412 post.

5 See PARA 419 et seq post.

6 See PARAS 416-417 post.

7 See PARA 418 post.

8 *Hunter v Moss* [1993] 1 WLR 934 (affd [1994] 3 All ER 215, [1994] 1 WLR 452, CA), referring to *Re Cheadle, Bishop v Holt* [1900] 2 Ch 620, CA, and *Re Clifford, Mallam v McFie* [1912] 1 Ch 29. It seems that such a gift will not be valid in relation to tangible property such as houses or cases of wine, unless there is a right of selection given to the beneficiary: *Asten v Asten* [1894] 3 Ch 260; *Re London Wine Co (Shippers) Ltd* [1986] PCC 121; *Hunter v Moss* supra.

9 See RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 784-785.

10 As to the creation of easements by express grant see generally EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 51 et seq. The requirement that a conveyance of an interest in land must be by deed in order to create a legal estate (see the Law of Property Act 1925 s 52(1); and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 51) does not prevent the creation of a legal easement by will. Cf the definition of 'conveyance' in the Law of Property Act 1925 s 205(1)(ii), which excludes a will: see SALE OF LAND vol 42 (Reissue) PARA 146.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(1) INTRODUCTION/410. Failure of interests.

410. Failure of interests.

A gift may fail for reasons personal to the donee; if, for example, he does not live to benefit by the gift, the gift lapses¹. Further, the donee may disclaim the gift². The gift may also fail, for example, by reason of the paramount claims of the personal representatives, who may require the subject matter of the gift for payment of debts or legacies having priority³. Again, the property given by the testator may not be his own property, but the property of some other person⁴.

Acts of the testator prior to the date of the will may cause a gift to fail in the sense that the gift takes effect not as a gift but in entire or partial satisfaction of a liability undertaken by the testator prior to and existing at the date of the will⁵. In certain cases a presumption arises as to the satisfaction, wholly or partially, by gifts in a will, of portions already covenanted to be paid, or of debts already owing to creditors at the date of the will, in which cases, unless the presumption is displaced by evidence or the context of the will, the portioner or creditor is bound to elect⁶.

Where the property given is no longer within the testator's power of disposal at the date of his death, the gift is adeemed⁷. Subject to this doctrine of ademption, no conveyance or other subsequent act of the testator relating to property comprised in the will, except an act revoking the will, prevents the will from operating with respect to the estate or interest in property of which the testator has the power of disposing by will at the time of his death⁸.

A gift may also fail by reason of the non-performance of a condition precedent⁹, or by reason of the disqualification of the donee for benefiting either by reason of his crime or fraud¹⁰, or because he or his spouse or his civil partner was an attesting witness¹¹, or by reason of the gift being uncertain¹², or infringing the rule against perpetuities¹³, or being contrary to public policy¹⁴. A gift for purposes partly but not exclusively charitable, and prima facie void, for example for uncertainty or perpetuity, may, however, sometimes be saved from failure and vest in the donee for charitable purposes only¹⁵. A gift for non-charitable purposes which cannot be enforced by individuals is void¹⁶ save in a few exceptional cases¹⁷.

1 As to lapse see PARA 450 et seq post.

2 See PARA 442 et seq post.

3 See PARA 315 ante. In the course of administration a gift may be subject to abatement or ademption. As to abatement in the case of specific legacies which are expressed to be given not as specific legacies but as general legacies see *Re Compton, Vaughan v Smith* [1914] 2 Ch 119. As to the administration of assets see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 374 et seq; as to the abatement of legacies see EXECUTORS

AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 506-513; and as to the order of application of assets see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 410-437. As to ademption see PARA 445 et seq post.

4 In such cases the true owner may sometimes be compelled under the doctrine of election to elect between taking a benefit under the testator's will and insisting on his own title to the property in question: see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

5 As to satisfaction see EQUITY vol 16(2) (Reissue) PARA 739 et seq.

6 As to the admissibility of evidence for these purposes see PARA 481 et seq post; and EQUITY vol 16(2) (Reissue) PARA 750.

7 *Moor v Raisbeck* (1841) 12 Sim 123 at 138; *Blake v Blake* (1880) 15 ChD 481; *Re Viscount Galway's Will Trusts*, *Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419. See also PARAS 316 ante, 445-449 post.

8 See the Wills Act 1837 s 23 (as amended); and PARA 386 ante. Before the commencement of the Wills Act 1837 any conveyance under which the testator's interest was altered, with certain exceptions, caused a gift of the property so affected to fail: see *Grant v Bridger* (1866) LR 3 Eq 347.

9 See PARA 420 post. As to illegality of conditions see PARA 419 post.

10 See PARA 341 ante.

11 See PARA 343 ante.

12 See PARA 554 post.

13 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq.

14 See PARA 422 post.

15 See the Charitable Trusts (Validation) Act 1954 s 1; and CHARITIES vol 8 (2010) PARA 97 et seq. For a recent case on the Act in which the authorities are reviewed see *Ulrich v Treasury Solicitor* [2005] EWHC 67 (Ch), [2005] 1 All ER 1059.

16 *Re Astor's Settlement Trusts*, *Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067. See also PARA 338 ante; and TRUSTS vol 48 (2007 Reissue) PARAS 607, 655.

17 See eg *Re Hooper*, *Parker v Ward* [1932] 1 Ch 38 (maintenance of tomb); and TRUSTS vol 48 (2007 Reissue) PARA 607.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/411. Successive and future interests.

(2) INTERESTS WHICH MAY BE CREATED

411. Successive and future interests.

Formerly, successive and future interests could be created by devise in real estate at law or in equity¹. With regard to chattels real (that is leaseholds), the common law originally refused to recognise the possibility of creating limitations in personal property, but it has long been settled that successive and future interests in chattels real could be created by way of devise or bequest at law or through the interposition of trustees in equity².

Since 31 December 1925, however, successive and future interests in real estate and chattels real can be created only as equitable interests³. Between 1 January 1926 and 31 December 1996 inclusive it was possible to create an entailed interest in chattels real and chattels personal but only by the like expressions as those by which before 1 January 1926 a similar estate tail could have been created by deed, not being an executory instrument, in freehold land⁴. Entailed interests cannot be created in any property, real or personal, by instruments coming into effect on or after 1 January 1997⁵.

Estates pur autre vie may be created by will⁶.

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 162.

2 2 Fearne's Contingent Remainders (10th Edn) s 168a; *Manning's Case* (1609) 8 Co Rep 94b; *Lampet's Case* (1612) 10 Co Rep 46b. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1229; REAL PROPERTY vol 39(2) (Reissue) PARA 104.

3 See the Law of Property Act 1925 s 1 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 165.

4 See *ibid* s 130(1) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and PERSONAL PROPERTY vol 35 (Reissue) PARAS 1229-1230; REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARA 938.

5 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

6 As to estates pur autre vie see REAL PROPERTY vol 39(2) (Reissue) PARA 151 et seq. As to life interests generally see REAL PROPERTY vol 39(2) (Reissue) PARAS 144-148. An interest may be created by will where the cestui que vie or one or more of the cestuis que vie are unborn, provided that they are ascertained within the limits allowed by the rules against perpetuities: see *Re Amos, Carrier v Price* [1891] 3 Ch 159 at 166-167 (estate for the life of the donee and the life of his heir). Cf *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 542, 546 (estate for the lives of unborn grandchildren, and the survivor of them); and see Challis's Law of Real Property (3rd Edn) p 213.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/412. Chattels given to successive donees.

412. Chattels given to successive donees.

The common law refused to recognise the possibility of creating a remainder in chattels personal¹. It was said that a devise of the chattel for an hour is for ever². A distinction was also drawn between the bequest of a thing for life, which was treated as a bequest of the whole thing absolutely, and the bequest of the use of the thing for life, in which case a limitation over after the life interest was recognised as good. This subtle distinction has long since disappeared³, and the bequest of a thing, other than consumables⁴, for life is construed as conferring the use of a thing for life⁵.

It is now clearly settled that a chattel personal may be bequeathed for successive and future interests both at law and, through the interposition of trustees, in equity so as to confer enforceable rights on the second and subsequent holders⁶. Where the property in the chattels is not vested in trustees, the precise nature of the interest taken by successive holders has not been finally determined⁷. It seems that the life tenant in possession is a quasi-trustee for the remaindermen, or it may be that he holds the chattel under an implied contract as bailee for the benefit of the remaindermen⁸. Whatever the true theory is, it is clear that the court of equity will at the instance of remaindermen restrain by injunction an attempted disposition by the holder in breach of the terms of the will⁹. Security is only required from the first taker in cases of risk. Usually the first taker merely signs an inventory¹⁰.

To be valid, successive and future interests in property must comply with the rule against perpetuities¹¹, and must not offend against any rule of public policy¹².

1 For an historical account see 2 Fearne's Contingent Remainders (10th Edn) s 168f. See also *Case of the Grail* (1459) YB 37 Hen 6, fo 30, pl 11; *Anon* (1548) Bro NC pl 388; *Welcden v Elkington* (1576) 2 Plowd 516 at 520; *Paramour v Yardley* (1579) 2 Plowd 539 at 541; *Lord Hastings v Douglas* (1634) Cro Car 343.

2 *Anon* (1542) Bro NC pl 334; *Welcden v Elkington* (1576) 2 Plowd 516 at 520.

3 See EQUITY vol 16(2) (Reissue) PARA 608.

4 As to consumables see PARA 413 post.

5 *Vachel v Vachel* (1669) 1 Cas in Ch 129; *Catchmay v Nicholas* (1673) 1 P Wms 6n; *Smith v Clever* (1688) 2 Vern 38, 59; *Shirley v Ferrers* (1690) 1 P Wms 6n; *Clarges v Duchess of Albemarle* (1691) 2 Vern 245; *Anon* (1695) Freem Ch 206; *Hyde v Parrat* (1696) 1 P Wms 1; *Tissen v Tissen* (1718) 1 P Wms 500 at 502; *Upwell v Halsey* (1720) 1 P Wms 651; *Foley v Burnell* (1783) 1 Bro CC 274.

6 *Hoare v Parker* (1788) 2 Term Rep 376 (trover); *Re Swan, Witham v Swan* [1915] 1 Ch 829. The interest of the second legatee pending the contingency may be a transmissible interest (*Doe d Roberts v Polgrean* (1791) 1 Hy Bl 535), and is of the nature of a chose in action within the Bills of Sale Acts (*Re Tritton, ex p Singleton* (1889) 61 LT 301; *Re Thynne, Thynne v Grey* [1911] 1 Ch 282), although not a chose or thing in action in the ordinary sense. See also PERSONAL PROPERTY vol 35 (Reissue) PARAS 1229-1230. As to the Bills of Sale Acts see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1630 et seq.

7 Cf PERSONAL PROPERTY vol 35 (Reissue) PARA 1230.

8 *Re Swan, Witham v Swan* [1915] 1 Ch 829 at 834-835; and see PERSONAL PROPERTY vol 35 (Reissue) PARA 1230.

9 *Re Swan, Witham v Swan* [1915] 1 Ch 829 at 835.

10 See EQUITY vol 16(2) (Reissue) PARA 608.

11 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq.

12 Where the duration of a limited gift is fixed by reference to an event contrary to public policy, such as the future separation of husband and wife (*Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA) or an attempt to fetter the duty of parents to provide for children's education (*Re Blake, Lynch v Lombard* [1955] IR 89), the gift is void. If the words are not part of the limitation, but impose a condition, it may be possible to reject them, leaving the gift absolute: *Re Moore, Trafford v Maconochie* supra; and see *Re Lovell, Sparks v Southall* [1920] 1 Ch 122. As to conditions attached to gifts see PARA 419 et seq post; and as to the construction of gifts to last until indefinitely distant events see PARA 429 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/413. Chattels consumed in the use.

413. Chattels consumed in the use.

In the case of specific gifts of chattels which are consumed in the use of them, the use and the property in the chattels can prima facie have no separate existence¹. Thus the old rule that a gift of a life interest is an absolute gift, and that a limitation over after a life interest is ineffectual, prima facie still applies². The testator may, however, expressly give a right to consume so much of certain consumables as the donee may require during his lifetime; the donee then has an absolute interest only in the chattels actually consumed, and the testator may validly make a gift over of the amount remaining unconsumed³. The rule does not apply in a case where, by the terms of the will or by implication from the circumstances of the case, the chattels are given to the successive legatees in the character of money's worth and are not intended for personal use or consumption by the legatee⁴. If they are stock of a farming or other business given in connection with a gift for life of that business, then, at all events where the stock is necessary to carry on the business, and the business and stock are intended to be kept up⁵, the first legatee does not take absolutely⁶.

Moreover, the old rule does not apply to residuary gifts of personal estate so far as they comprise such chattels in cases where, under another rule⁷, to effectuate a presumed intention that the legatees are successively to enjoy the same subject matter⁸, the chattels must be sold and only the interest of the proceeds paid to the legatee for life⁹ unless, by the terms of the will, he is given the right to enjoy them in their original form¹⁰.

1 *Randall v Russell* (1817) 3 Mer 190 at 195 per Grant MR.

2 *Randall v Russell* (1817) 3 Mer 190 (corn and hay); *Andrew v Andrew* (1845) 1 Coll 686 at 691 (wine, spirits and hay); *Montresor v Montresor* (1845) 1 Coll 693 (wine and provisions); *Bryant v Easterson* (1859) 5 Jur NS 166 (farming stock); *Phillips v Beal* (1862) 32 Beav 25 (wine for household consumption); *Breton v Mockett* (1878) 9 ChD 95. See also GIFTS vol 52 (2009) PARA 224; PERSONAL PROPERTY vol 35 (Reissue) PARA 1230. The fact that the personal estate bequeathed is of a description not likely to be given for limited interests has been considered in the construction of the will: *Porter v Tournay* (1797) 3 Ves 311 at 313; *Manning v Purcell* (1855) 7 De GM & G 55 at 61; *Randfield v Randfield* (1860) 8 HL Cas 225 at 236-237; *Re Moir's Estate, Moir v Warner* [1882] WN 139. Although the rule prima facie applies, it may be excluded by the circumstances: see *Re Hall's Will* (1855) 1 Jur NS 974.

3 *Re Colyer, Millikin v Snelling* (1886) 55 LT 344.

4 A direction for valuation shows an intention that the property given should be considered to pass as money and not in its original form: *Bryant v Easterson* (1859) 5 Jur NS 166 at 167-168 per Stuart V-C. In that case, there being no direction for valuation, farming stock did not pass to the legatees in remainder.

5 Cf *Maynard v Gibson* [1876] WN 204, followed in *Paine v Countess of Warwick* [1914] 2 KB 486 (deer intended to be kept up by tenant for life). As regards severed crops from time to time on a farm, the life tenant takes absolutely, although intended to keep up the business: *Steward v Cotton* (1777) 5 Russ 17n; *Bryant v Easterson* (1859) 5 Jur NS 166; *Re Powell, Dodd v Williams* [1921] 1 Ch 178 at 180-181.

6 *Montresor v Montresor* (1845) 1 Coll 693 (live and dead stock; tenant for life entitled to produce only); *Groves v Wright* (1856) 2 K & J 347 (farming stock); *Phillips v Beal* (1862) 32 Beav 25 (wine used in wine merchant's business); *Cockayne v Harrison* (1872) LR 13 Eq 432; *Myers v Washbrook* [1901] 1 KB 360 (farming stock). See also *Griffin v McCabe* (1918) 52 ILT 134; *Beresford v Preston* (1920) 54 ILT 48 (where an inquiry was directed). The rule that a gift of consumables is an absolute gift to the first legatee does not apply in the case of farming stock, although not given in connection with a business: see *Groves v Wright* supra at 351; *Myers v Washbrook* supra at 363 per Darling J. Cf, however, *Bryant v Easterson* (1859) 5 Jur NS 166. A provision that the first legatee is not to be liable for depreciation assists a construction giving him an absolute interest: see *Breton v Mockett* (1878) 9 ChD 95. Where the legatee of farming stock was by the will made subject to an obligation to maintain the stock 'at equal value or as near thereto as circumstances will admit', she was held to be entitled to a proportionate part of the increase in value: *Re Powell, Dodd v Williams* [1921] 1 Ch 178.

7 Is the rule in *Howe v Earl of Dartmouth, Howe v Countess of Aylesbury* (1802) 7 Ves 137: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 540-544. As to the effect of the rule see also SETTLEMENTS vol 42 (Reissue) PARAS 945-946; TRUSTS vol 48 (2007 Reissue) PARAS 745-746. A clause excluding the rule does not necessarily exclude the provisions of the Apportionment Act 1870: see SETTLEMENTS vol 42 (Reissue) PARA 957.

8 As to this presumption as the ground for the rule in *Howe v Earl of Dartmouth, Howe v Countess of Aylesbury* (1802) 7 Ves 137 see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 540; TRUSTS vol 48 (2007 Reissue) PARA 746.

9 *Randall v Russell* (1817) 3 Mer 190 at 195; cf *Re Maclachlan, Maclachlan v Campbell* (1900) 26 VLR 548 (where a tenant for life was held liable to account for live stock).

10 See *Re Bagshaw's Trusts* (1877) 46 LJ Ch 567 at 571, CA; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 542.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/414. Vesting of interests.

414. Vesting of interests.

Where the legatees are given successive interests in the chattels and they are not vested in trustees, the property in the chattels vests at law in the first legatee on the assent of the executor and in the other successive takers on the happening of the respective future contingencies¹. The assent of the executor to the first is an assent to all².

1 *Foley v Burnell* (1789) 4 Bro Parl Cas 34, 319; *Stevenson v Liverpool Corpn* (1874) LR 10 QB 81; *Shep Touch* (8th Edn) 419-420. Formerly, where the use only of the chattel was devised, the property continued to be vested in the executors: *Case of the Grail* (1459) YB 37 Hen 6, fo 30, pl 11; *Anon* (1692) Freem Ch 137; *Chamberlaine v Chamberlaine* (1674) Freem Ch 141.

2 *Manning's Case* (1609) 8 Co Rep 94b at 96a; *Foley v Burnell* (1789) 4 Bro Parl Cas 34, 319; *Stevenson v Liverpool Corpn* (1874) LR 10 QB 81. As to assents generally see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 559 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/415. Conditional gifts and gifts over.

415. Conditional gifts and gifts over.

A gift may be made as a conditional gift or limitation subject to the rules restricting such conditions and gifts¹. A further gift to take effect on a condition not being fulfilled may be made subject to the same restrictions²; and such a gift is subject also to the qualification that the second gift must fit in sensibly with the previous gift so as to show what is to be done with the property³.

1 As to conditions attached to gifts see PARA 419 et seq post; and as to the limits of suspension of vesting see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1008, 1014 et seq.

2 See generally *Shaw v Ford* (1877) 7 ChD 669 at 673-674.

3 *Re Catt's Trusts* (1864) 2 Hem & M 46 at 53; *Musgrave v Brooke* (1884) 26 ChD 792 at 794. As to the need for certainty in conditions see PARA 429 et seq post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/416. Options to purchase.

416. Options to purchase.

A person may be given the right to purchase property forming part of the testator's estate either at a price fixed by the testator¹ or by some person or persons nominated by him, such as trustees², or at a valuation³. Whether or not the right to purchase is personal to the donee or is transmissible depends in each case on the construction of the will⁴. While there may be in an option an element of bounty⁵, the exercise of the option creates the relationship of vendor and purchaser between the testator's estate and the donee so as to give the donee the right to have the property free from incumbrances⁶.

1 *Earl of Radnor v Shafte* (1805) 11 Ves 448 at 454; *Re Eve, National Provincial Bank Ltd v Eve* [1956] Ch 479, [1956] 2 All ER 321. Cf *Re Hammersley, Foster v Hammersley* [1965] Ch 481, [1965] 2 All ER 24 (where the gift of an option was exercisable on the death of the testator's wife; as she predeceased him, the option was not exercisable). As to options in leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 135 et seq; and as to options to purchase generally see SALE OF LAND vol 42 (Reissue) PARA 27.

2 See *Earl of Radnor v Shafte* (1805) 11 Ves 448; *Edmonds v Millett* (1855) 20 Beav 54. As to directions for taking the price into account on distribution see *Re Dallmeyer, Dallmeyer v Dallmeyer* [1896] 1 Ch 372, CA. In *Smith v Cotton's Trustees* 1956 SC 338, trustees had a discretion to sell shares but had first to offer them to S; the company went into liquidation before the trustees decided to sell, so the option was never exercisable.

3 *Edwards v Edwards* (1837) 1 Jur 654; *Waite v Morland* (1866) 12 Jur NS 763; *Re Dowse, Dowse v Dowse* [1951] 1 All ER 558n; *Talbot v Talbot* [1968] Ch 1, [1967] 2 All ER 920, CA ('at a reasonable valuation'; sufficiently certain), applied in *Re Malpass, Lloyds Bank plc v Malpass* [1985] Ch 42, [1984] 2 All ER 313 (option to purchase at value agreed with district valuer for probate purposes; no valuation because estate exempt from capital transfer tax; inquiry directed); *Dutton v Dutton* [2001] WTLR 553 (option to purchase property 'at a price to be determined by a chartered surveyor'; price to be fair and reasonable, not an open market valuation); *Re Bliss, Layton v Newcombe* [2001] 1 WLR 1973, [2002] WTLR 541 (option to purchase property at 80% of full market price; probate valuation not sufficient; valuation to be made as at death in light of what would have been known to valuer at that time disregarding subsequent events). Where an option was conferred to purchase property at the value placed on it for estate duty purposes, the duty of the executors was to consider the interests of the estate as a whole and they were under no duty to consider the effect as between the beneficiaries: *Re Hayes' Will Trusts, Pattinson v Hayes* [1971] 2 All ER 341, [1971] 1 WLR 758. Where an option to be exercised within three months of death to purchase property at the figure agreed by the executors and the Capital Taxes Office was not exercised within that period because no figure had been agreed, it was held (not following *Re Avard, Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548) that the option did not lapse: *Re Bowles, Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] Ch 422, [2003] 2 All ER 387. See also *Re Gray, Allardyce v Roebuck* [2004] EWHC 1538 (Ch), [2004] 3 All ER 754, [2004] WTLR 779 (option to purchase; will specifying periods for acceptance and completion; time for acceptance of the essence but not time for completion).

4 *Skelton v Younghouse* [1942] AC 571, [1942] 1 All ER 650, HL. See also *Taylor v Cooper* (1846) 10 Jur 1078; *Re Cousins, Alexander v Cross* (1885) 30 ChD 203, CA; *McKendrick v Lewis* (1889) 15 VLR 450; *Belshaw v Rollins* [1904] 1 IR 284 at 289; *Re Zerny's Will Trusts, Symons v Zerny* [1968] Ch 415, [1968] 1 All ER 686, CA.

5 *Re Fison's Will Trusts, Fison v Fison* [1950] Ch 394, [1950] 1 All ER 501. The element of bounty confers on the donee a beneficial interest in the estate of the testator (*Re Lander, Lander v Lander* [1951] Ch 546, [1951] 1 All ER 622), but such an interest represented by the difference between option price and market value has been held not to be a property specifically bequeathed (*Re Eve, National Provincial Bank Ltd v Eve* [1956] Ch 479, [1956] 2 All ER 321). If there is a condition not only for the exercise of the option but also for the payment of the purchase money within a specified time, the donee is not entitled to an extension of time because he has not received an abstract of title: *Brooke v Garrod* (1857) 2 De G & J 62. See also *Re Davison and Torrens* (1865) 17 Ch R 7.

6 *Givan v Massey* (1892) 31 LR Ir 126; *Re Wilson, Wilson v Wilson* [1908] 1 Ch 839; *Re Fison's Will Trusts, Fison v Fison* [1950] Ch 394, [1950] 1 All ER 501. It appears that a gift conditional on the giving of any consideration (*Blower v Morret* (1752) 2 Ves Sen 420 at 422), such as a release of an existing right of dower under the former law (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 506), or of an existing debt due from the testator (see EQUITY vol 16(2) (Reissue) PARAS 751-753; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 508), prima facie constitutes the donee a purchaser so as to give him priority for his legacy.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/417. Rights of person exercising option.

417. Rights of person exercising option.

The donee of an option to purchase must as a rule strictly comply with any terms of the option, for example as to the time of signifying his exercise of the option¹, or as to the time of payment². He is entitled, on exercising the option, to the surplus, after deducting the option price, on any sale after the testator's death made on a compulsory purchase³, or in an action to administer the testator's estate⁴, or by a life tenant⁵. An option to purchase shares may be exercisable in respect of other shares into which they have been converted⁶. Where two or more options to purchase the same property are given to different donees without any priority, and all are exercised concurrently, the effect may be that all options fail to take effect⁷.

1 *Re Allgood's Will Trusts, Chatfield v Allen* (18 December 1980, unreported), CA (where trustees were directed to offer property to Mr and Mrs A at a valuation, but no formal offer was made and there was no acceptance within the stipulated two months of the death of the testator; the gift over took effect). Where a will confers an option to purchase property exercisable within a stated time with completion within a stated time after acceptance, time is of the essence as regards the exercise of the option but not as regards completion unless there is an express gift over or other indication that time is to be of the essence in this respect also: *Re Gray, Allardyce v Roebuck* [2004] EWHC 1538 (Ch), [2004] 3 All ER 754, [2004] WTLR 779. Where an offer has

to be made by the trustees, or the price has to be fixed, time may run only from communication of the terms to the donee: *Lord Lilford v Keck* (1862) 30 Beav 295; *Austin v Tawney* (1867) 2 Ch App 143. If time is directed to run from an event actually happening in the testator's lifetime, but assumed by the testator to happen after his death, the direction may be construed so that time will run from his death: *Evans v Stratford* (1864) 2 Hem & M 142. If no time is fixed, the donee is allowed a reasonable time: *Huckstep v Mathews* (1685) 1 Vern 362.

2 *Master v Willoughby* (1705) 2 Bro Parl Cas 244; *Dawson v Dawson* (1837) 8 Sim 346; *Brooke v Garrod* (1857) 2 De G & J 62. In all these cases there was a gift over on non-payment within the time; the mere signification of acceptance was not sufficient to comply with the terms of the will.

3 *Re Cant's Estate* (1859) 4 De G & J 503.

4 *Re Kerry, Boccock v Kerry, Arnall v Kerry* [1889] WN 3.

5 *Re Armstrong's Will Trusts, Graham v Armstrong* [1943] Ch 400, [1943] 2 All ER 537.

6 *Re Fison's Will Trusts, Fison v Fison* [1950] Ch 394, [1950] 1 All ER 501.

7 See *Huckstep v Mathews* (1685) 1 Vern 362 at 363; *Jeffrey v Scott* (1879) 27 Grant 314 (Ont).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(2) INTERESTS WHICH MAY BE CREATED/418. Right of selection.

418. Right of selection.

A testator who has several properties, all having the same description, may by his will give one of them to a donee, leaving the choice to the donee¹; and generally the testator may give rights to select property to any value or amount². Where the testator has several properties of the same description and gives one to each of several devisees, the right of selection is given to those devisees in the order in which they are named, but, if they are collectively referred to (as, for example, where the testator gives one house to each of his nephews and nieces), the right of selection is, failing agreement, to be determined by lot³. The fact that the donee is to be able to select may appear either by express words in the will, or by reasonable inference from it⁴, and, where no limit is placed on the right of selection, the court treats the donee as entitled to take the whole property to which the right applies, if he duly shows that such is his choice⁵.

If, however, the will shows that the testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, the court is unable to say either from the will itself or from extrinsic evidence⁶ which of the several properties the testator referred to, the gift fails for uncertainty⁷, and the court cannot, in order to avoid an intestacy, change the will or construe it as giving to the legatee the option of choosing one of the properties⁸. Where a right of selection is given to one donee, and the remainder of the property after selection is given to another donee, specifically and not by way of residuary gift, and the right of selection lapses⁹ by the death of the first donee in the testator's lifetime, the gift to the second donee also fails¹⁰.

1 *Asten v Asten* [1894] 3 Ch 260 at 262 per Romer J. See also *Harby v Moore* (1860) 6 Jur NS 883; Co Litt 145a. As to this principle in the case of a deed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 214-215.

2 For an example of a right to select land of a certain value see *Earl of Bandon v Moreland* [1910] 1 IR 220. After an unequivocal selection, the donee cannot change and make a fresh selection: *Littledale v Bickersteth* (1876) 24 WR 507. Cf para 444 post.

3 *Re Knapton, Knapton v Hindle* [1941] Ch 428, [1941] 2 All ER 573.

4 *Asten v Asten* [1894] 3 Ch 260 at 263. See also *Marshall's Case* (1598) 3 Dyer 281a n. Thus where a devise is simply of ten acres adjoining or surrounding a house, part of a larger quantity, the choice of the ten acres is in the donee: *Hobson v Blackburn* (1833) 1 My & K 571 at 575; *Tapley v Eagleton* (1879) 12 ChD 683 ('two houses in K street', the testator having three); *Duckmanton v Duckmanton* (1860) 5 H & N 219 ('one close in R field'). In the case of a gift of a number of shares out of a larger number, some of which are fully paid and others only partly paid, the legatee has an absolute right to select the best shares (*Jacques v Chambers* (1846) 2 Coll 435 at 441; *Millard v Bailey* (1866) LR 1 Eq 378; *O'Donnell v Welsh* [1903] 1 IR 115; Shep Touch (8th Edn) 251), unless the class of shares referred to by the testator can be ascertained by construction of the will (*Re Cheadle, Bishop v Holt* [1900] 2 Ch 620, CA; and see note 8 infra). In *Wilson v Wilson* (1847) 1 De G & Sm 152, on the words of the will, the right of selection was given not to the donee, but to the other persons interested.

5 *Arthur v Mackinnon* (1879) 11 ChD 385 (where Jessel MR said that, following the words literally, the donee might take the whole with the exception of one article of probably no value, when the maxim de minimis would apply); *Re Sharland, Kemp v Rozey (No 2)* (1896) 74 LT 664, CA; *Re Baron Wavertree of Delamere, Rutherford v Hall-Walker* [1933] Ch 837. See also *Cooke v Farrand* (1816) 7 Taunt 122; *Kennedy v Kennedy* (1853) 10 Hare 438 (not followed in, but distinguished from, *Arthur v Mackinnon* supra; and followed in *Re Gillespie, Gillespie v Gillespie* (1902) 22 NZLR 74 at 76, NZ CA (selection after taking possession)).

6 le including, where admissible, extrinsic evidence of intention: see PARAS 481, 506-507 post.

7 *Richardson v Watson* (1833) 4 B & Ad 787; *Blundell v Gladstone* (1852) 3 Mac & G 692; and see PARA 482 post.

8 *Asten v Asten* [1894] 3 Ch 260 at 263; approved in *Re Cheadle, Bishop v Holt* [1900] 2 Ch 620 at 623, CA, per Lord Alverstone MR. Where the property out of which the gift is made is a homogeneous mass, such as money in a bank account or shares in a company, the gift will be valid even though there is no right of selection: *Hunter v Moss* [1993] 1 WLR 934 (affd [1994] 1 All ER 215, [1994] 1 WLR 452, CA), referring to *Re Cheadle, Bishop v Holt* supra and *Re Clifford, Mallam v McFie* [1912] 1 Ch 29.

9 Where nothing passes to the donee until selection, the choice must be made during his life; the right of selection does not pass to his executors: *Re Madge, Pridie v Bellamy* (1928) 44 TLR 372; approved in *Skelton v Younghouse* [1942] AC 571 at 577, [1942] 1 All ER 650 at 653, HL, per Viscount Maugham.

10 *Boyce v Boyce* (1849) 16 Sim 476.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/419. General rules as to conditions.

(3) CONDITIONS ATTACHED TO GIFTS

419. General rules as to conditions.

By his will a testator may freely attach conditions to his gifts, provided that they do not conflict with certain recognised restrictions and are not inconsistent with other provisions of the will¹.

A condition must not be unlawful²; it must not be contrary to public policy³; it must not be uncertain⁴; it must not be such that the court declines to investigate whether it has been or will be complied with⁵; and it must not be in such terms that the event causing forfeiture may not occur until a date beyond the limits of the rule against perpetuities⁶. A condition amounting to a trust⁷ is subject to the restriction that the object for whose benefit the trust is imposed must be capable of taking⁸, but there does not appear to be any like restriction where the condition does not amount to a trust, but binds the donee to do acts which may benefit an object incapable of taking⁹.

A condition which is inconsistent with other provisions of the will may be unenforceable, as, for example, when it is repugnant to the interest given to the donee, or is repugnant to other gifts in the will, or is otherwise inconsistent with the rest of the will¹⁰. It must also be possible for the condition to be complied with¹¹.

Where the condition is in itself valid, the donee may nevertheless in some circumstances be excused from performing it¹².

1 As to an estate in fee granted upon condition see REAL PROPERTY vol 39(2) (Reissue) PARAS 97-99, 114-116. As to wills entirely conditional in their operation see PARA 305 ante; and as to the construction of conditions generally see PARA 691 et seq post.

A condition will fail if it is in a document which cannot be admitted in evidence as part of the will: see *Re Williams, Taylor v University of Wales* (1908) 24 TLR 716; and PARA 489 post. As to conditions undertaken by the donee by agreement with the testator see PARA 510 post; and TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

A condition may in effect create a trust: see *Re Frame, Edwards v Taylor* [1939] Ch 700, [1939] 2 All ER 865; *Olszanecki v Hillocks* [2002] EWHC 1997 (Ch), [2004] WTLR 975 (gift of property on condition that donees should permit H to continue to reside there created a trust in favour of H). See also PARA 691 post.

2 See GIFTS vol 52 (2009) PARAS 252-254. A condition which in effect delegates to another a testator's testamentary power is void: *Re Neave, Neave v Neave* [1938] Ch 793, [1938] 3 All ER 220. The conferring of a general or wide-ranging power of appointment does not constitute a delegation of the testamentary power: *Re Beatty's Will Trusts, Hinves v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503; and see also PARA 309 ante.

3 See PARAS 422-423 post.

4 See PARAS 429-432 post.

5 *W -- v B --* (1849) 11 Beav 621 (condition relating to cohabitation), as explained in *Cooke v Cooke* (1864) 11 Jur NS 533 at 535 per Wood V-C. Cf *Poole v Bott* (1853) 11 Hare 33 at 39; *Potter v Richards* (1855) 1 Jur NS 462 (condition as to illegal cohabitation).

6 *Re Spitzel's Will Trusts, Spitzel v Spitzel* [1939] 2 All ER 266.

7 See note 1 supra; and TRUSTS.

8 See PARA 335 ante; cf TRUSTS vol 48 (2007 Reissue) PARA 607.

9 See *Lloyd v Lloyd* (1852) 2 Sim NS 255 (repair of a tomb); *Roche v M'Dermott* [1901] 1 IR 394 (donee to give executors bond for repair of a tomb; but it was suggested that the condition was unenforceable). Cf *Goodman v Saltash Corp'n* (1882) 7 App Cas 633.

10 See PARA 433 post.

11 See PARA 434 post.

12 See PARA 435 et seq post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/420. Conditions precedent and subsequent.

420. Conditions precedent and subsequent.

According to the construction of the will¹, a condition is either a condition precedent, that is to say such that there is no gift intended at all unless and until the condition is fulfilled², or a condition subsequent, that is to say such that non-compliance with the condition is intended to put an end to the gift³. Subject to the terms of the will, the date at which a condition precedent must be fulfilled is the date at which the interest, if any, vests in possession⁴. Where it is doubtful whether a condition is precedent or subsequent, the court prima facie treats it as subsequent, for there is a presumption in favour of early vesting⁵. Words expressing a condition may be treated as being words of limitation⁶, and a gift expressed in the form of a limitation may be effective, although as a condition subsequent it would be void⁷. In particular, words providing for the divesting of an interest on marriage may be susceptible of construction as

words of limitation⁸. Words which import a condition may also be construed as merely creating a trust or charge, or even simply a personal obligation⁹.

1 As to construction with regard to conditions generally see PARA 691 et seq post.

2 *Wood v Duke of Southampton* (1692) Show Parl Cas 83, HL; *Wood v Webb* (1695) Show Parl Cas 87; *Harvy v Aston* (1740) Com 726 at 744; *Reynish v Martin* (1746) 3 Atk 330 at 332; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 74. See also CHARITIES vol 8 (2010) PARA 135; GIFTS vol 52 (2009) PARA 251.

3 See *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75; *Sifton v Sifton* [1938] AC 656, [1938] 3 All ER 435, PC. See also CHARITIES vol 8 (2010) PARA 136; GIFTS vol 52 (2009) PARA 251; SETTLEMENTS vol 42 (Reissue) PARA 740 et seq. A condition in a will that a devisee is to take for himself and his heirs the name and arms of the testator is a condition subsequent, since it cannot be complied with at once: *Gulliver d Corrie v Ashby* (1766) 4 Burr 1929. As to name and arms clauses see PARAS 422, 432 post; and SETTLEMENTS vol 42 (Reissue) PARA 745 et seq.

4 *Re Allen, Faith v Allen* [1954] Ch 259, [1954] 1 All ER 526.

5 *Sifton v Sifton* [1938] AC 656 at 676, [1938] 3 All ER 435 at 446, PC; and see *Re Tepper's Will Trusts, Kramer v Ruda* [1987] Ch 358, [1987] 1 All ER 970. Where an interest is contingent on any event, it is in effect precedent to the gift that the event should happen. A vested or contingent interest may be subject to be divested or extinguished on any specified event; the gift is then in effect subject to a condition subsequent. As to vested and contingent remainders see REAL PROPERTY vol 39(2) (Reissue) PARAS 169-171; and as to the rules of law restricting the suspension of vesting see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1008, 1014 et seq. A condition the non-fulfilment of which will put an end to a contingent estate is a condition subsequent, even though the event to which the condition refers is not subsequent to the happening of the contingency, so that the condition really prevents the gift from ever taking effect: *Egerton v Earl Brownlow* (1853) 4 HL Cas 1.

6 *Page v Hayward* (1705) 2 Salk 570 (where a condition as to marriage was construed as a gift of an estate in special tail); *Pelham-Clinton v Duke of Newcastle* [1902] 1 Ch 34, CA (affd [1903] AC 111, HL). Such a construction would no longer be possible in the case of a testator dying on or after 1 January 1997 as entailed interests cannot be created by instruments coming into operation on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. As to the construction of conditions as words of limitation see further PARA 691 post.

7 *Re Wilkinson, Page v Public Trustee* [1926] Ch 842 at 847; *Re Wolffe's Will Trusts, Shapley v Wolffe* [1953] 2 All ER 697, [1953] 1 WLR 1211.

8 See PARA 428 post.

9 See PARA 441 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/421. Effect of invalidity in general.

421. Effect of invalidity in general.

When a condition is void as illegal¹, contrary to public policy², repugnant to a prior gift³, impossible⁴ or uncertain⁵, the effect on the gift depends on whether it is of realty or personalty, and whether the condition is precedent or subsequent⁶. If the gift is of realty, and the condition is precedent, the gift as well as the condition fails to take effect⁷, and this is so even if there is no gift over as the doctrine as to conditions in terrorem does not apply to devises of realty⁸. If the gift is of personalty and the condition is precedent, then, if it is originally impossible, or is made so by the testator's act or default, the bequest is good, but, if the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by an act of God, the bequest fails⁹. A gift of personalty takes effect free from a condition precedent which is voidable and is avoided by the donee, or is repugnant to the gift, or fails to operate on the gift

as being in *terrorem*¹⁰. A gift subject to a void condition subsequent takes effect free from the condition¹¹.

1 See PARA 419 ante; and GIFTS vol 52 (2009) PARAS 251-256.

2 See PARAS 422-423 post.

3 See PARA 433 post.

4 See PARA 434 post.

5 See PARAS 424, 429-432 post.

6 It may be material whether the condition involves *malum in se*, that is an act which is in its nature wrong, eg to kill a person, or *malum prohibitum*, that is an act which is forbidden by statute: see *Re Piper, Dodd v Piper* [1946] 2 All ER 503; *Re Elliott, Lloyds Bank Ltd v Burton-on-Trent Hospital Management Committee* [1952] Ch 217, [1952] 1 All ER 145; and see Shep Touch (8th Edn) 132. In Ireland it has been doubted whether the distinction between conditions involving *malum prohibitum* and conditions involving *malum in se*, which is a distinction of the civil law, is properly applicable in the courts of equity: *Re Blake, Lynch v Lombard* [1955] IR 89 at 104.

7 Co Litt 206b; Shep Touch (8th Edn) 132; *Harvey v Lady Aston* (1737) 1 Atk 361 at 375; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; *Re Turton, Whittington v Turton* [1926] Ch 96.

8 See PARA 425 post.

9 See *Reynish v Martin* (1746) 3 Atk 330 at 332; *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 at 128-129, CA, per Cotton LJ; Roper on Legacies (4th Edn) p 757; Jarman on Wills (8th Edn) pp 1457-1458. See also PARA 434 post. As to what constitutes an act of God see CONTRACT vol 9(1) (Reissue) PARA 907.

10 See PARA 425 post.

11 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; *Re Gassiot, Fladgate v Vintners' Co* (1901) 70 LJ Ch 242. Dicta in *Jones v Jones* (1876) 1 QBD 279 and in *Bellairs v Bellairs* (1874) LR 18 Eq 510 suggest that a condition subsequent in restraint of marriage, where the estate is for life or in fee, is valid as regards realty; but this seems doubtful.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/422. Public policy.

422. Public policy.

A condition may be void, or void in part of its application¹, because it is against public policy². Conditions against public policy are those conditions as to which the state has or may have an interest that they should remain unperformed or unfulfilled³.

Examples of conditions void as contrary to public policy are conditions inciting the donee to commit a crime⁴, to use corruption⁵ or to do any act prohibited by law⁶; or inciting the donee to exert private or political party influence in any matter or act of state⁷, such as obtaining a peerage⁸; or tending to produce a future separation of husband and wife⁹, or the separation of parent and child¹⁰; or interfering with the right of a parent to control the education of his or her children¹¹ or their religious instruction¹²; or forbidding the service of the donee in the defence of the realm¹³; or unreasonably¹⁴ restraining marriage¹⁵, trade¹⁶ or industry¹⁷; and any other conditions tending to such result¹⁸. A condition requiring the assumption of a name and arms is not contrary to public policy merely because it may require a married woman to assume a name different from that of her husband¹⁹. A condition is void if it has a tendency towards harm of the public interest, and it is immaterial that compliance with the condition might be achieved without actual mischief²⁰.

It is not contrary to public policy for a testator to impose a condition requiring the legatee to be of a particular religious faith²¹, and a condition against disputing the will, or disputing legitimacy, is not void on this ground²² unless there is no gift over²³.

1 There may be severance of a condition: see *Re Howard's Will Trusts*, *Levin v Bradley* [1961] Ch 507 at 524, [1961] 2 All ER 413 at 422; *Re Hepplewhite's Will Trusts* [1977] CLY 2710 (five conditions of which two were invalid; gift took effect subject to remaining three).

2 As to public policy generally see CONTRACT vol 9(1) (Reissue) PARA 841 et seq. A similarity between wills and contracts in this respect has been suggested: see *Cooke v Turner* (1846) 15 M & W 727 at 735 per Rolfe B; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 150 per Pollock CB.

3 *Cooke v Turner* (1846) 15 M & W 727 at 735-736. See also *Evanturel v Evanturel* (1874) LR 6 PC 1 at 29.

4 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 189; *Shep Touch* (8th Edn) 132 (to kill a person); 2 Bl Com (14th Edn) 156.

5 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 59, 99, 172.

6 *Mitchel v Reynolds* (1711) 1 P Wms 181.

7 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 142, 150, 163, 196.

8 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1. See also *Earl of Kingston v Lady Pierepont* (1681) 1 Vern 5. However, in *Fender v St John-Mildmay* [1938] AC 1 at 13, [1937] 3 All ER 402 at 407-408, HL, Lord Atkin doubted whether such a condition would now still be held invalid. The principle has been held not to apply in cases where the title involves no duties other than those of every good citizen: *Re Wallace*, *Champion v Wallace* [1920] 2 Ch 274, CA (condition precedent of acquiring baronetcy). It appears, moreover, that a gift may be made to a person conditionally on his claim to a title being sustained, or conditionally on his success or failure in a certain suit: *Earl Fingal v Blake* (1829) 2 Mol 50 at 78; cf *Caithness v Sinclair* 1912 SC 79 (a Scottish case where a condition that, if a person did not succeed to a peerage, the lands should go over, was upheld). Cf the usual shifting clause in settlements on succession to a title or to family estates: see SETTLEMENTS vol 42 (Reissue) PARA 740 et seq.

9 See *Re Caborne*, *Hodge and Nabarro v Smith* [1943] Ch 224, [1943] 2 All ER 7 (doubting *Re Thompson*, *Lloyds Bank Ltd v George* [1939] 1 All ER 681). The condition is valid, however, where it merely refers to the state of circumstances existing at the testator's death and cannot influence the conduct of the persons in question: *Shewell v Dwaris* (1858) John 172. Similarly, a gift limited to a woman already separated from her husband, with a gift over if she rejoins him, may be valid if the intention is to make provision for the donee: *Re Charleton*, *Bracey v Sherwin* (1911) 55 Sol Jo 330; *Re Lovell*, *Sparks v Southall* [1920] 1 Ch 122. As to contracts for separation generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 423 et seq.

10 *Re Boulter*, *Capital and Counties Bank v Boulter* [1922] 1 Ch 75 (condition that children should not reside abroad); *Re Piper*, *Dodd v Piper* [1946] 2 All ER 503 (condition to keep child away from divorced parent). See also *Re Morgan*, *Dowson v Davey* (1910) 26 TLR 398 (condition requiring children not to live with their father if separated from his wife); *Re Sandbrook*, *Noel v Sandbrook* [1912] 2 Ch 471 (condition forfeiting benefits if donees should live with or be under the control of their father). Cf *Colston v Morris* (1821) 6 Madd 89 (where a condition not to interfere with a daughter's education was enforced). A condition requiring adult children to keep away from their parent may be valid: *McDonald v Trustees, Executors and Agency Co Ltd* (1902) 28 VLR 442.

11 *Re Tegg*, *Public Trustee v Bryant* [1936] 2 All ER 878; *Re Burke* [1951] IR 216.

12 *Re Blake*, *Lynch v Lombard* [1955] IR 89. See also *Re Borwick*, *Borwick v Borwick* [1933] Ch 657 (settlement).

13 *Re Beard*, *Reversionary and General Securities Co Ltd v Hall*, *Re Beard*, *Beard v Hall* [1908] 1 Ch 383; *Re Edgar*, *Cohen v Edgar* [1939] 1 All ER 635 (condition against accepting a public office; commission in territorial army is a public office); *Re Reich*, *Public Trustee v Guthrie* (1924) 40 TLR 398 (condition preventing a woman from adopting a profession void for uncertainty).

14 See generally *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL; and PARA 424 text and note 2 post.

15 See PARAS 423-424 post.

16 *Cooke v Turner* (1846) 15 M & W 727 at 736; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 18n. Cf, however, *Jones v Bromley* (1821) 6 Madd 137 (where only the construction of the condition was considered). As to restraint of trade see EMPLOYMENT vol 39 (2009) PARA 19; COMPETITION ol 18 (2009) PARA 377 et seq.

17 *Cooke v Turner* (1846) 15 M & W 727 at 736 (donee to leave his land uncultivated); *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 144, 241.

18 See eg *Re Wood, Walker v Carlile* (1920) 36 TLR 560 (condition against observing summer time). It appears that a condition forbidding two sisters to reside together, if not uncertain, is not in itself illegal: *Ridgway v Woodhouse* (1844) 7 Beav 437 at 443; cf para 430 post. Where under an Order in Council property in the British dominions of German nationals was charged with payment of claims by British nationals with regard to their property in Germany, a direction that life interests given by a will to German nationals should cease on their being precluded from taking by war legislation was not void as being against public policy: *Re Schiff, Henderson v Schiff* [1921] 1 Ch 149.

19 See *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA. In Australia, however, a name clause has been struck down on the grounds that it was anachronistic and infringed an individual's right to use the surname of his own choosing: *Littrass v Littrass* [1995] 2 VR 283, Vict SC. See also PARA 432 post.

20 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; *Re Wallace, Champion v Wallace* [1920] 2 Ch 274, CA.

21 See *Re Dickson's Trust* (1850) 1 Sim NS 37 (in case daughter became a nun); *Hodgson v Halford* (1879) 11 ChD 959 (forfeiture on marrying a Christian, or forsaking Jewish religion); *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL (forfeiture if beneficiary should be or become a Roman Catholic); *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA (condition that beneficiary should be of the Jewish faith and married to an 'approved wife'). See also *Wainwright v Miller* [1897] 2 Ch 255; *Re May, Eggar v May* [1917] 2 Ch 126; *Patton v Toronto General Trusts Corp* [1930] AC 629, PC; *Re May, Eggar v May* [1932] 1 Ch 99, CA. Such a condition may, however, be void for uncertainty: see *Re Tepper's Will Trusts, Kramer v Ruda* [1987] Ch 358, [1987] 1 All ER 970 (condition subsequent forfeiting interests of beneficiaries who remained outside 'the Jewish faith' held to be void in the absence of admissible evidence of the Jewish faith as practised by the testator and his family; proceedings adjourned to enable such evidence to be filed); and see PARA 431 post. As to the period during which a ban as to religion applies see *Re Wright, Public Trustee v Wright* (1837) 158 LT 368.

22 *Cooke v Turner* (1846) 15 M & W 727; *Evanturel v Evanturel* (1874) LR 6 PC 1 at 29; *Nathan v Leonard* [2002] EWHC 1701 (Ch), [2003] 4 All ER 198, [2003] 1 WLR 827 (where, however, the condition was held to be void for uncertainty). A condition against disputing a will is not, however, construed as extending to cases where there is a reasonable cause for litigation: see PARA 478 post.

23 *Re Dickson's Trust* (1850) 1 Sim NS 37 at 46.

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423. General restraint of marriage.

A condition in general restraint of marriage can, in the nature of things, only be a condition subsequent, but the words used may be capable of being treated as words of limitation¹. If the condition shows an intention to restrain marriage, it is void as being contrary to public policy², but the condition is only construed as indicating such an intention where the gift is of personalty³, including the proceeds of realty directed to be converted⁴. Where the gift is of realty for life or in fee simple, or a legacy charged on real estate, it seems that such a condition is valid⁵, but it is void on the ground of repugnancy if imposed on a tenant in tail⁶. The condition may, however, be good if the intention is not the promotion of celibacy but some other, and lawful, purpose, such as the benefit of the object in whose favour the legacy is limited over⁷. If a testator gives a legacy to personal representatives with a gift over if the donee has married, the condition is valid, for the testator is merely providing that, if the donee has married, then the testator, and not the donee, is to have the disposition of the gift⁸. If, however, the condition operates in terrorem⁹, the mere fact that the penalty is not inflicted on the person who violates

the condition, but on his children or his personal representatives, does not prevent the condition from being void¹⁰.

1 See PARAS 420 ante, 691 post.

2 *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570. See also *Long v Dennis* (1767) 4 Burr 2052 at 2055, 2057; *Lloyd v Lloyd* (1852) 2 Sim NS 255 at 263; and PARA 425 note 3 post.

3 *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570; *Re Bellamy, Pickard v Holroyd* (1883) 48 LT 212; *Re Wright, Mott v Issott* [1907] 1 Ch 231 at 237.

4 *Bellairs v Bellairs* (1874) LR 18 Eq 510 (following *Lloyd v Lloyd* (1852) 2 Sim NS 255). As to a mixed fund without any direction for conversion see PARA 425 note 1 post.

5 *Jones v Jones* (1876) 1 QBD 279 at 282; *Bellairs v Bellairs* (1874) LR 18 Eq 510 at 513. See also *Fitchet v Adams* (1740) 2 Stra 1128.

6 *Earl of Arundel's Case* (1575) 3 Dyer 342b. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 606, 676.

7 *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458.

8 *Re Fentem, Cockerton v Fentem* [1950] 2 All ER 1073 (applying *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458).

9 See PARA 425 post.

10 *Re Fentem, Cockerton v Fentem* [1950] 2 All ER 1073.

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424. Partial restraint of marriage.

A condition in a gift of realty in partial restraint of marriage is valid whether the condition is precedent or subsequent and whether or not there is a gift over¹. In the case of personalty such a condition is valid where the restraint is in the circumstances reasonable² and where there is a gift over so that the condition is not merely in terrorem³. A condition in restraint of a second marriage is valid⁴, whether of a widow or a widower⁵, and whether the testator was the first spouse or a stranger⁶. So is a condition against marrying a particular person⁷, or a member of a particular class of persons⁸, or a person of a particular religion⁹, or forbidding marriage under a specified and reasonable age¹⁰; and it seems that a condition may validly prescribe the ceremonies and place of a marriage¹¹. Further, an interest may be given conditionally on the donee marrying a particular person¹² or one of a class of persons¹³. A condition which is not, on the face of it, in general restraint of marriage, but which is a deterrent to marriage because the person subject to it can never know whether he can safely marry anyone is unreasonable and void¹⁴.

1 *Haughton v Haughton* (1824) 1 Mol 611.

2 *Keily v Monck* (1795) 3 Ridg Parl Rep 205 at 261; *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570 at 579; *Younge v Furse* (1857) 8 De GM & G 756 at 759.

3 See PARA 425 post.

4 *Barton v Barton* (1693) 2 Vern 308; *Scott v Tyler* (1788) 2 Bro CC 431 at 487; *Morley v Rennoldson*, *Morley v Linkson* (1843) 2 Hare 570 at 580; *Lloyd v Lloyd* (1852) 2 Sim NS 255 at 263; *Evans v Rosser* (1864) 2 Hem & M 190. See also *Hampden v Brewer* (1666) 1 Cas in Ch 77; *Pyle v Price* (1802) 6 Ves 779; *Re Rutter, Donaldson v Rutter* [1907] 2 Ch 592. Such a restraint is apparently to be considered as partial only, albeit it is directed against any further marriage: see *Leong v Lim Beng Chye* [1955] AC 648, [1955] 2 All ER 303, PC.

5 *Allen v Jackson* (1875) 1 ChD 399 at 404, CA.

6 *Newton v Marsden* (1862) 2 John & H 356.

7 *Jarvis v Duke* (1681) 1 Vern 19; *Scott v Tyler* (1788) 2 Dick 712 at 721; *Re Bathe, Bathe v Public Trustee* [1925] Ch 377; *Re Hanlon, Heads v Hanlon* [1933] Ch 254. See also *Lester v Garland* (1808) 15 Ves 248.

8 *Jenner v Turner* (1880) 16 ChD 188 (domestic servant); *Greene v Kirkwood* [1895] 1 IR 130 at 142 (legatee marrying beneath her). In *Perrin v Lyon* (1807) 9 East 170, a condition prohibiting marriage to a Scotsman was upheld. Such a condition would not be avoided by the Race Relations Act 1976 as that Act does not extend to discrimination in testamentary dispositions or private trusts: cf *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL.

9 *Duggan v Kelly* (1848) 10 I Eq R 295 at 473 ('Papist'); *Hodgson v Halford* (1879) 11 ChD 959 ('not a Jew'); *Re Knox* (1889) 23 LR Ir 542 ('not a Protestant'). See also note 8 supra; and PARA 431 post.

10 *Stackpole v Beaumont* (1796) 3 Ves 89 at 97 (age of 21); *Younge v Furse* (1857) 8 De GM & G 756 (age of 28). See also *Scott v Tyler* (1788) 2 Bro CC 431 at 488 per Lord Thurlow LC. As to consent to marriage see PARA 426 post.

11 *Scott v Tyler* (1788) 2 Bro CC 431; *Haughton v Haughton* (1824) 1 Mol 611 (marriage 'contrary to the order and established rules' of Quakers); *Renaud v Lamothe* (1902) 32 SCR 357 (the laws and rites of the Catholic Church).

12 *Viscount Falkland v Bertie* (1698) 2 Vern 333; *Davis v Angel* (1862) 4 De GF & J 524; *Kiersey v Flahavan* [1905] 1 IR 45.

13 See *Hodgson v Halford* (1879) 11 ChD 959.

14 *Re Lanyon, Lanyon v Lanyon* [1927] 2 Ch 264 (condition against marrying 'relation by blood'). See also *Re Fentem, Cockerton v Fentem* [1950] 2 All ER 1073.

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425. Doctrine of in terrorem.

A condition in restraint of marriage attached to a gift of personalty or a gift charged on personal estate only may be void against the donee as being made in terrorem¹, that is to say as a mere idle threat to induce the donee to comply with the condition, but not to affect the bequest². It seems that only conditions in partial, as opposed to general, restraint of marriage are subject to the doctrine of in terrorem³. It does not apply to devises of realty⁴, or to bequests charged on real estate⁵, or on personalty directed to be laid out in the purchase of real estate⁶.

A condition is not in terrorem if the testator shows an intention that it is to be effective⁷, as by making a different disposition of the subject matter of the gift in the event of non-compliance with the condition, that is to say when there is a gift over⁸. If the condition is subsequent, a gift over is essential to the validity of the condition⁹, and must either be specific, or effected by a direction that, on non-compliance with the condition, the gift is to fall into residue¹⁰; a mere residuary gift without more is not enough¹¹. Where in the case of a condition precedent the testator shows by a gift over that it is not merely in terrorem¹², it seems that a mere residuary bequest is enough¹³.

1 The rule was derived from the civil law, as administered by the ecclesiastical courts and adopted by the courts of equity with modifications: see *Bellairs v Bellairs* (1874) LR 18 Eq 510 at 515-516 (where the analogy with the rules as to vesting (see PARA 696 et seq post) is pointed out); *Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96 at 115, CA, per Vaughan Williams LJ; *Leong v Lim Beng Chye* [1955] AC 648 at 661, [1955] 2 All ER 903 at 907, PC. As to the case of a mixed gift of real and personal estate, without any trust for conversion, and as to the case of a legacy charged on such a mixed fund see *Reynish v Martin* (1746) 3 Atk 330 at 335; *Duddy v Gresham* (1878) 2 LR Ir 442 at 458, Ir CA, per Ball LC; but cf *Duddy v Gresham* supra at 466-467 per Christian LJ, apparently followed in *Re Pettifer, Pettifer v Pettifer* [1900] WN 182.

2 *Re Dickson's Trust* (1850) 1 Sim NS 37 at 43; *Duddy v Gresham* (1878) 2 LR Ir 442 at 464, Ir CA. As to conditions requiring consent to marriage see PARA 426 post.

3 As to general restraint of marriage see PARA 423 ante; and as to partial restraint see PARA 424 ante. Conditions in general restraint of marriage have been considered as subject to the doctrine of in terrorem (see *Marples v Bainbridge* (1816) 1 Madd 590; *Bellairs v Bellairs* (1874) LR 18 Eq 510), but it seems that these decisions should be related to grounds of public policy (see the criticism in *Duddy v Gresham* (1878) 2 LR Ir 442 at 468, Ir CA, per Christian LJ). Alternatively, cases in which the restraint has been on remarriage (see eg *Marples v Bainbridge* supra) may be explained on the basis that, PARADOXICALLY, a condition in restraint of remarriage is treated by the courts as a condition in partial restraint of marriage: see *Leong v Lim Beng Chye* [1955] AC 648, [1955] 2 All ER 903, PC. A gift over does not render valid a condition in general restraint of marriage: *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570; *Lloyd v Lloyd* (1852) 2 Sim NS 255. The doctrine also applies to conditions not to dispute a will: see PARA 478 post. In *Re Dickson's Trust* (1850) 1 Sim NS 37 at 43, 45, the doctrine was explained as based on public policy; conditions against alienation of the life estate were there said to be void as in terrorem unless there was a gift over, but the case is not now accepted as laying down the true rule as to such conditions: see *Rochford v Hackman* (1852) 9 Hare 475 at 481. It appears, at all events, that the doctrine does not ordinarily apply to conditions other than in restraint of marriage or against disputing a will, which do not contravene any rule of public policy (*Re Dickson's Trust* supra (forfeiture if donee became a nun)), and such other conditions do not become in terrorem, or otherwise invalid, by the mere want of a gift over (*Re Dickson's Trust* supra at 43; *Re Catt's Trusts* (1864) 2 Hem & M 46 at 62, followed in *Re Hanlon, Heads v Hanlon* [1933] Ch 254). On the construction of particular wills, however, other conditions may be construed as inducements or threats addressed to the donee personally, and as not affecting the gift, if the context requires it: see *Byng v Lord Strafford* (1843) 5 Beav 558 at 571-572 (affd sub nom *Hoare v Byng* (1844) 10 Cl & Fin 508, HL); *Re Meagher, Trustees, Executors and Agency Co Ltd v Meagher* [1910] VLR 407 (donee to acquire and learn a profession).

4 *Duddy v Gresham* (1878) 2 LR Ir 442 at 457, 465, Ir CA; *Jenner v Turner* (1880) 16 ChD 188 at 196 per Bacon V-C.

5 *Reynish v Martin* (1746) 3 Atk 330 at 335.

6 *Pullen v Ready* (1743) 2 Atk 587 at 590.

7 As to how far the application of the rule depends on construction in this respect see *Harvey v Lady Aston* (1737) 1 Atk 361 at 377-378 per Willes CJ; *Bellairs v Bellairs* (1874) LR 18 Eq 510 at 576 per Jessel MR. As to the ascertainment of the testator's intention see PARA 512 et seq post.

8 See *Craven v Brady* (1867) LR 4 Eq 209 at 215; affd (1869) 4 Ch App 296.

9 *Lloyd v Branton* (1817) 3 Mer 108 at 117 (where the effect of the gift over is explained either as an expression of contrary intention, or as making the prior gift a conditional limitation, namely, a limitation to endure until the condition is broken). See also *Jarvis v Duke* (1681) 1 Vern 19 at 20; *Stratton v Grymes* (1698) 2 Vern 357; *Aston v Aston* (1703) 2 Vern 452 at 453; *Hervey v Aston* (1738) Willes 83; *Wheeler v Bingham* (1746) 3 Atk 364 at 366; *Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96 at 106, CA; *Re Brace, Gurton v Clements* [1954] 2 All ER 354, [1954] 1 WLR 955.

10 *Lloyd v Branton* (1817) 3 Mer 108. Cf, however, *Pullen v Ready* (1743) 2 Atk 587 at 590.

11 *Wheeler v Bingham* (1746) 3 Atk 364.

12 *Malcolm v O'Callaghan* (1817) 2 Madd 349; *Gardiner v Slater* (1858) 25 Beav 509. In the case of a gift conditional on marriage with consent, a gift over on death before 21 or marriage with consent is not sufficient for this purpose: see *Gray v Gray* (1889) 23 LR Ir 399.

13 *Amos v Horner* (1699) 1 Eq Cas Abr 112 pl 9; *Semphill v Bayly* (1721) Prec Ch 562.

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426. Conditions as to consent to marriage.

A condition may take the form of a requirement that the consent of a named person be obtained to the donee's marriage. If the condition is precedent and is in terrorem, the gift takes effect on marriage without consent¹, but not until marriage². The fact that the testator makes separate provision for the donee in the event of non-compliance with the condition shows that it is not in terrorem³.

A condition, whether precedent or subsequent, requiring consent to marriage is generally construed as operative only during the life of the person whose consent is required⁴. If, therefore, that person dies during the lifetime of the testator, or before any marriage, the gift takes effect free from the condition⁵. Where the gift vests at a specified age, the condition is construed as referring only to a marriage under that age⁶. Where, however, the condition refers to marriage with a consent attached to a certain office, such as that of trustee or guardian, it may be operative at any time while a person holds or can be appointed to that office⁷. The giving of consent in such cases is of a fiduciary nature⁸, but the condition is satisfied as well for the purpose of a gift over as for the purpose of seeing who is entitled under the conditional gift⁹ by marriage with the testator's own unqualified¹⁰ previous consent to it¹¹, or by his subsequent approbation of it¹². Thus the condition does not, as a rule, apply to a donee who marries with the testator's consent and becomes a widow after the date of the will during the testator's life¹³.

1 *Semphill v Bayly* (1721) Prec Ch 562; *Underwood v Morris* (1741) 2 Atk 184. The actual decision in *Underwood v Morris* supra was dissented from, however, on account of the devise over, in *Hemmings v Munckley* (1783) 1 Bro CC 304 per Lord Loughborough LC, and in *Scott v Tyler* (1788) 2 Bro CC 431 at 488 per Lord Thurlow LC. As to gifts in terrorem see PARA 425 ante; and as to conditions precedent and subsequent see PARA 420 ante.

2 *Garbut v Hilton* (1739) 1 Atk 381; *Elton v Elton* (1747) 3 Atk 504; *Gray v Gray* (1889) 23 LR Ir 399.

3 *Bellasis v Ermine* (1663) 1 Cas in Ch 22; *Garret v Pritty* (1693) 2 Vern 293; *Creagh v Wilson* (1706) 2 Vern 572; *Gillet v Wray* (1715) 1 P Wms 284; *Re Nourse, Hampton v Nourse* [1899] 1 Ch 63 at 71. See also *Holmes v Lysaght* (1733) 2 Bro Parl Cas 261. As to limitations depending on marriage see PARA 428 post.

4 *Mercer v Hall* (1793) 4 Bro CC 326; *Green v Green* (1845) 2 Jo & Lat 529 at 539-540; *Curran v Corbet* [1897] 1 IR 343. See also *Booth v Meyer* (1877) 38 LT 125 (explaining *Dawson v Oliver-Massey* (1876) 2 ChD 753, CA). As to the nature of the consent required see PARA 427 post.

5 *Peyton v Bury* (1731) 2 P Wms 626 (on appeal sub nom *Painton v Berry* (1732) Kel W 36); *Aislabie v Rice* (1818) 3 Madd 256; *Collett v Collett* (1866) 35 Beav 312.

6 *Desbody v Boyville* (1729) 2 P Wms 547; *Pullen v Ready* (1743) 2 Atk 587; *Knapp v Noyes* (1768) Amb 662. As to gifts vesting on attaining a specified age or on marriage with consent cf *Dobbins v Bland* (1730) 2 Eq Cas Abr 545; *Knight v Cameron* (1807) 14 Ves 389; *West v West* (1863) 4 Giff 198. There is no such restriction where no age is expressly or impliedly specified: *Lloyd v Branton* (1817) 3 Mer 108.

7 *Re Brown's Will, Re Brown's Settlement* (1881) 18 ChD 61, CA (guardian who might be appointed by the court). See also *Gardiner v Slater* (1858) 25 Beav 509 at 511 per Romilly MR. Where the consent of executors or trustees is required, the consent of those who renounce is unnecessary: *Worthington v Evans* (1823) 1 Sim & St 165; *Boyce v Corbally* (1834) L & G temp Plunk 102; *Ewens v Addison* (1858) 4 Jur NS 1034 (doubting *Graydon v Hicks* (1739) 2 Atk 16).

8 All the trustees or persons holding the office must as a rule concur; a consent of a majority is not sufficient unless the testator expressly allows it: *Clarke v Parker* (1812) 19 Ves 1 at 17, 22 (dissenting from *Harvey v Lady Aston* (1737) 1 Atk 361 at 375). The court may interfere if the consent is withheld or refused by a trustee from a corrupt, vicious or unreasonable cause (*Clarke v Parker* supra at 18), and may give consent if a trustee refuses either to consent or dissent (*Goldsmid v Goldsmid* (1815) 19 Ves 368). As to the control of a trustee's discretion generally see TRUSTS vol 48 (2007 Reissue) PARA 971.

9 *Re Park, Bott v Chester* [1910] 2 Ch 322 at 325-326.

10 See *Lowry v Patterson* (1874) IR 8 Eq 372.

11 *Clarke v Berkeley* (1716) 2 Vern 720; *Parnell v Lyon* (1813) 1 Ves & B 479; *Coventry v Higgins* (1844) 14 Sim 30; *Tweeddale v Tweeddale* (1878) 7 ChD 633; *Re Park, Bott v Chester* [1910] 2 Ch 322.

12 *Wheeler v Warner* (1823) 1 Sim & St 304.

13 *Crommelin v Crommelin* (1796) 3 Ves 227.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/427. Nature of consent.

427. Nature of consent.

Where there is a condition requiring consent to the donee's marriage¹, the consent must be a free consent², not obtained by duress³. A general consent⁴, or a consent evidenced by conduct⁵ or presumed from the circumstances⁶, or a conditional consent where the condition attached is afterwards performed⁷, or a subsequent approbation⁸, may be considered as a substantial compliance with the condition, even where a consent in writing is required by the will⁹.

A consent given unconditionally cannot be withdrawn¹⁰ except on grounds which affect the propriety of giving the consent¹¹.

1 As to conditions requiring consent to marriage see PARA 426 ante; and as to limitations depending on marriage see PARA 428 post.

2 No reasons need, as a rule, be given for dissent: *Clarke v Parker* (1812) 19 Ves 1 at 22.

3 *Dillon v Harris* (1830) 4 Bli NS 321, HL; *Re Stephenson's Trusts* (1870) 18 WR 1066 (mother's consent only to save daughter's reputation).

4 *Mercer v Hall* (1793) 4 Bro CC 326; *Pollock v Croft* (1816) 1 Mer 181.

5 *D'Aguilar v Drinkwater* (1813) 2 Ves & B 225. See also *Burleton v Humphrey* (1755) Amb 256.

6 *Re Birch* (1853) 17 Beav 358 (where the question of consent was not raised until 28 years after the marriage).

7 *Le Jeune v Budd* (1834) 6 Sim 441; *Re Smith, Keeling v Smith* (1890) 44 ChD 654.

8 *Burleton v Humfrey* (1755) Amb 256. It is not, however, the general rule that subsequent approbation is sufficient, especially if the vesting of an estate is in question: see *Clarke v Parker* (1812) 19 Ves 1 at 21. Cf *Reynish v Martin* (1746) 3 Atk 330 at 331; *Malcolm v O'Callaghan* (1817) 2 Madd 349.

9 *Worthington v Evans* (1823) 1 Sim & St 165; *Holton v Lloyd* (1827) 1 Mol 30.

10 *Le Jeune v Budd* (1834) 6 Sim 441 at 455.

11 *Lord Strange v Smith* (1755) Amb 263; *Merry v Ryves* (1757) 1 Eden 1; *Dashwood v Lord Bulkeley* (1804) 10 Ves 230 at 242; *Re Brown, Ingall v Brown* [1904] 1 Ch 120.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/428. Limitations depending on marriage.

428. Limitations depending on marriage.

The considerations as to conditions in restraint of marriage¹ apply only to conditions, and not to words merely describing the interest created. The question in each case is whether the words constitute a limitation or a condition². An interest may be given to endure so long as the donee remains unmarried³, and, generally, marriage may be made the ground of a gift ceasing or commencing⁴.

1 See PARAS 423 et seq ante.

2 *Heath v Lewis* (1853) 3 De GM & G 954 at 957; *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 at 129, 132, CA; *Re King's Trusts* (1892) 29 LR Ir 401 at 408. See also *Re Wolffe's Will Trusts, Shapley v Wolffe* [1953] 2 All ER 697, [1953] 1 WLR 1211; *Re Johnson's Will Trusts, National Provincial Bank Ltd v Jeffrey* [1967] Ch 387, [1967] 1 All ER 553; and PARA 420 ante.

3 *Godfrey v Hughes* (1847) 1 Rob Eccl 593; *Heath v Lewis* (1853) 3 De GM & G 954; *Potter v Richards* (1855) 24 LJ Ch 488; *Re King's Trusts* (1892) 29 LR Ir 401; *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458. See also *Re M'Loughlin's Estate* (1878) 1 LR Ir 421, Ir CA.

4 *Webb v Grace* (1848) 2 Ph 701 at 702; *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA; *Re Morton, M'Auley v Harvey* (1919) 53 ILT 105.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/429. Uncertainty.

429. Uncertainty.

Unless the court can put a clear meaning on a condition, it is unenforceable and, therefore, in effect, void¹. The question of uncertainty usually arises² where it is alleged that a condition subsequent will defeat a vested estate³. To be valid the condition must then be such that the court can see from the beginning precisely and distinctly on the happening of what event it was that the preceding vested estate was to determine⁴.

There is a clear distinction, however, between uncertainty of expression⁵ and uncertainty in operation. It is the duty of the court to endeavour to resolve uncertainty of expression by construing the will in the light of the ordinary canons of construction, while bearing in mind that the law favours vested estates⁶. If, when the will is so construed, a meaning cannot be properly ascribed to the language used by the testator, it fails for uncertainty. If, however, a proper meaning can be given to the language, the next step is to consider whether the condition is too uncertain in operation to satisfy the test of validity previously stated⁷. The fact that the decision whether the condition is fulfilled is given to the trustees cannot resolve uncertainty as to the events prescribed by the testator as those in which the condition is to operate, and such uncertainty is, generally speaking, fatal to the validity of such a condition⁸. Where, however, the event is sufficiently defined by the testator, there may be an advantage and difficulty may be avoided by conferring the power of decision on trustees⁹. If the gift does not give a discretion to trustees to determine the meaning of a condition in itself uncertain but directs them to pay or withhold a legacy on being satisfied that a certain state of affairs exists, no question of discretion arises; it is the trustees' duty to make up their minds whether the state of affairs does or does not exist and to pay or withhold the legacy accordingly¹⁰. In the case of a condition precedent no such general or academic test is called for as in the case of a condition subsequent. All that the donee must do is to establish, if he can, at the relevant date, that he satisfied the condition, whatever be the appropriate test. Uncertainty which might invalidate a condition if subsequent does not necessarily do so if it is precedent. Thus it is not right for the court to declare a condition precedent void for uncertainty so as thereby to defeat all possible claimants to the gift unless its terms are such that it is impossible to give them any meaning at all, or such that they involve repugnancies or inconsistencies in the possible tests which they postulate, as distinct, for example, from mere problems of degree¹¹.

1 *Fillingham v Bromley* (1823) Turn & R 530.

2 For an example of uncertainty in relation to a condition precedent or qualification see *Re Tarnpolsk, Barclays Bank Ltd v Hyer* [1958] 3 All ER 479, [1958] 1 WLR 1157 (condition as to marriage to person of 'Jewish race and religion' uncertain as to race). As to uncertainty in the description of the donee see PARA 347 ante; and as to conditions as to race or religion see PARA 431 post.

3 As to conditions precedent and conditions subsequent see PARA 420 ante.

4 *Clavering v Ellison* (1859) 7 HL Cas 707 at 725 per Lord Cranworth; *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16; *Bromley v Tryon* [1952] AC 265, [1951] 2 All ER 1058, HL. See also *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158 at 164; *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471 at 477; *Re Hanlon, Heads v Hanlon* [1933] Ch 254; *Sifton v Sifton* [1938] AC 656, [1938] 3 All ER 435, PC; *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 at 693, [1960] 3 All ER 503 at 526, HL, per Lord Jenkins.

5 'Uncertainty of expression' is now often called 'conceptual uncertainty': see eg *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 at 20, [1972] 2 All ER 1304 at 1309, CA, per Sachs LJ.

6 As to construction in cases of uncertainty see PARA 554 et seq post.

7 *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158 at 164; *Re Murray, Martins Bank Ltd v Dill* [1955] Ch 69, [1954] 3 All ER 129, CA; *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA. See also *Re De Vere's Will Trusts, Jellett v O'Brien* [1961] IR 224 (name and arms clause uncertain).

8 *Re Jones, Midland Bank Executor and Trustee Co Ltd v Jones* [1953] Ch 125, [1953] 1 All ER 357.

9 *Re Coxen, McCallum v Coxen* [1948] Ch 747, [1948] 2 All ER 492. Cf *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA (questions of qualification to be referred to Chief Rabbi).

10 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL.

11 *Re Allen, Faith v Allen* [1953] Ch 810, [1953] 2 All ER 898, CA. See also *Re Selby's Will Trusts, Donn v Selby* [1965] 3 All ER 386, [1966] 1 WLR 43; *Re Lowry's Will Trusts, Barclays Bank Ltd v United Newcastle upon Tyne Hospitals Board of Governors* [1967] Ch 638 at 648, [1966] 3 All ER 955 at 959; *Re Abraham's Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175 (not following *Re Walter's Will Trusts, National Provincial Bank Ltd v Board of Guardians and Trustees for Relief of Jewish Poor, Registered* (1962) 106 Sol Jo 221).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/430. Uncertain conditions as to residence.

430. Uncertain conditions as to residence.

Whether or not a condition as to residence is uncertain seems to depend on whether the testator uses simple words like 'occupy' or 'reside', in which case the condition is uncertain¹, or postulates more complex requirements, such as residence for a fixed period or personal presence, in which case the condition may be sufficiently certain². The absence of a gift over on defeasance points to the condition being precatory only³. In conditions as to residence, 'abroad' normally means 'outside the British Isles'⁴.

1 *Fillingham v Bromley* (1823) Turn & R 530 ('live and reside'); *Re M'Cleary, Moffat v M'Cleary* [1932] 1 IR 16 ('come to live'); *Sifton v Sifton* [1938] AC 656, [1938] 3 All ER 435, PC ('continue to reside in Canada'); *Re Field's Will Trusts, Parry-Jones v Hillman* [1950] Ch 520, [1950] 2 All ER 188 ('occupy'); but cf *Re Moir, Warner v Moir* (1884) 25 ChD 605 ('reside'; keeping up establishment held to be sufficient compliance). See also SETTLEMENTS vol 42 (Reissue) PARA 740 et seq.

2 *Walcot v Botfield* (1854) Kay 534 ('reside or keep up a suitable establishment'); *Dunne v Dunne* (1855) 7 De GM & G 207 ('principal place of abode'); *Wynne v Fletcher* (1857) 24 Beav 430 ('usual place of abode'); *Re*

Wright, Mott v Issott [1907] 1 Ch 231 ('reside'); *Re Vivian, Vivian v Swansea* (1920) 36 TLR 222 ('reside' for fixed period); *Re Coxen, McCallum v Coxen* [1948] Ch 747, [1948] 2 All ER 492 ('in the opinion of my trustees she shall have ceased permanently to reside therein'); *Re Gape, Verey v Gape* [1952] Ch 743, [1952] 2 All ER 579, CA ('take up permanent residence in England'). The requirement in *Re Wilkinson, Page v Public Trustee* [1926] Ch 842 ('permanent home') was held valid as a limitation. 'Living with a person' implies personal association with that person; mere proximity is insufficient: *Re Paskins' Will Trusts, Paskins v Underwood* [1948] 2 All ER 156.

3 *Re Brace, Gurton v Clements* [1954] 2 All ER 354, [1954] 1 WLR 955 ('on condition she will always provide a home for my daughter at the above address').

4 *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/431. Conditions as to race or religion.

431. Conditions as to race or religion.

Conditions referring to race or religion are not in themselves intrinsically void as being against public policy¹ or under statute². However, in such cases the distinction between conditions precedent and conditions subsequent is of importance³. In the case of a condition precedent, it is sufficient for its validity that a beneficiary or intended beneficiary should be able to show that he, at all events, fulfils the stated requirements⁴, whereas, in the case of a condition subsequent, it is essential for its validity that the person liable to suffer the forfeiture must be able to understand precisely what act or omission will incur the forfeiture⁵.

Conditions as to race, which are often bound up with conditions as to religion, are probably void⁶, whether precedent or subsequent, as the whole concept of race is not sufficiently certain⁷.

It now appears, however, that conditions relating to membership of the Church of England⁸ or of the Roman Catholic Church⁹ are sufficiently certain even when subsequent, as are conditions concerning membership of the Protestant¹⁰ or Lutheran religion¹¹. The position regarding the Jewish religion was formerly unclear, there being two cases, both involving conditions subsequent, where the condition was upheld¹², but also a large number of other cases, all involving conditions subsequent, where the condition was held uncertain¹³. The authority of the latter decisions has, however, been undermined¹⁴ and conditions requiring adherence to the Jewish faith are now more likely to be upheld¹⁵.

If the condition is uncertain, it is not possible for it to be resolved by some formula provided by the testator (for example 'in the opinion of my trustees')¹⁶, although it might be possible for him to refer to an arbiter holding the same views on religious faith as the testator himself¹⁷.

Where a minor is involved, the time for choice as to compliance or non-compliance with any such condition is postponed until majority and a reasonable time thereafter¹⁸.

1 *Hodgson v Halford* (1879) 11 ChD 959; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL; but see *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, [1961] ALR 339, Aust HC (where a gift after a life estate to the testator's sons and their wives 'if they profess the Protestant faith' was held void, not for uncertainty but as against public policy as tending to give rise to discord between husband and wife). As to conditions in partial restraint of marriage in general not being against public policy see PARA 424 ante.

2 The provisions of the Race Relations Act 1976 do not extend to racial discrimination in testamentary dispositions or private trusts. As to racial discrimination generally see DISCRIMINATION vol 13 (2007 Reissue) PARA 436 et seq.

3 See *Re Selby's Will Trusts, Donn v Selby* [1965] 3 All ER 386 at 388, [1966] 1 WLR 43 at 46 per Buckley J.

4 *Re Allen, Faith v Allen* [1953] Ch 810, [1953] 2 All ER 898, CA.

5 See *Clavering v Ellison* (1859) 7 HL Cas 707 at 725 per Lord Cranworth.

6 Ie but not under the Race Relations Act 1976: see note 2 supra.

7 *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16, HL ('not of Jewish parentage and of the Jewish faith'; all members of the court held the first limb of the condition void, and four also held the second limb void, although on this latter point the decision has been confined to its particular facts (see *Blathwayt v Baron Cawley* [1976] AC 397 at 425, [1975] 3 All ER 625 at 636, HL, per Lord Wilberforce)); *Re Wolffe's Will Trusts, Shapley v Wolffe* [1953] 2 All ER 697, [1953] 1 WLR 1211 (gift on marriage 'to a person of the Jewish faith and the child of Jewish parents' was construed as a limitation which had not taken effect, but, if it was a condition, it was precedent and incapable of fulfilment; this case was decided before *Re Allen, Faith v Allen* [1953] Ch 810, [1953] 2 All ER 898, CA (cited in note 8 infra) had been reported); *Re Tarnpolsk, Barclays Bank Ltd v Hyer* [1958] 3 All ER 479, [1958] 1 WLR 1157 (marriage with 'a person of Jewish race and religion'; religion posed no difficulty but race wholly uncertain). Cf *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047 (where the condition precedent 'of Jewish blood by one or both parents' was held certain). See also *Re Gott, Glazebrook v University of Leeds* [1944] Ch 193, [1944] 1 All ER 293 (where Uthwatt J declined to decide whether 'of British and Christian parentage' was certain).

8 *Clavering v Ellison* (1859) 7 HL Cas 707 ('educated in the Protestant religion according to the rites of the Church of England'); *Re Allen, Faith v Allen* [1953] Ch 810, [1953] 2 All ER 898, CA ('a member of the Church of England and an adherent to the doctrines of that church'); *Re Mills' Will Trusts, Yorkshire Insurance Co Ltd v Coward* [1967] 2 All ER 193, [1967] 1 WLR 837 ('a member of the Church of England or of some church abroad professing the same tenets'). Cf *Re Tegg, Public Trustee v Bryant* [1936] 2 All ER 878 (where a condition subsequent that the beneficiary 'should conform to and be a member of the Church of England' was held void for uncertainty). Unless this case can be distinguished from *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL, by reason of the presence of the word 'conform', its authority must be gravely suspect. See also *Re Gott, Glazebrook v University of Leeds* [1944] Ch 193, [1944] 1 All ER 293 (cited in note 7 supra).

9 *Duggan v Kelly* (1848) 10 I Eq R 295 ('intermarry with a Papist'; valid but confined to minority); *Re May, Eggar v May* [1917] 2 Ch 126 ('not be a Roman Catholic at my death or being a Roman Catholic at my death cease to be a Roman Catholic within a year'); *Re May, Eggar v May* [1932] 1 Ch 99, CA (same will); *Re Wright, Public Trustee v Wright* (1937) 158 LT 368 ('have become or become a Roman Catholic or marry or shall have married a Roman Catholic'; valid but confined to testatrix's lifetime); *Re Morrison's Will Trusts, Walsingham v Blathwayt* [1940] Ch 102, [1939] 4 All ER 332 ('become a Roman Catholic'); *Re Evans, Hewitt v Edwards* [1940] Ch 629 ('become a convert to the Roman Catholic religion'); *McKenna's Will Trusts, Re, Higgins v Bank of Ireland and McKenna* [1947] IR 277 ('marry a Roman Catholic'); *McCausland v Young* [1949] NI 49, Ir CA ('become a Roman Catholic or profess that he or she is of the Roman Catholic religion'); *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL ('be or become a Roman Catholic'). Cf *Re Borwick, Borwick v Borwick* [1933] Ch 657 ('be or become a Roman Catholic or not be openly or avowedly Protestant').

10 *Carteret v Carteret* (1723) 2 P Wms 132 ('if the eldest son of A turns Protestant, then to such eldest son'); *Re Knox* (1889) 23 LR Ir 542 ('marry a Protestant wife, the daughter of Protestant parents who have always been Protestants'); but see *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, [1961] ALR 339, Aust HC (cited in note 1 supra).

11 *Patton v Toronto General Trusts Corp'n* [1930] AC 629, PC.

12 See *Re Selby's Will Trusts, Donn v Selby* [1965] 3 All ER 386, [1966] 1 WLR 43 (marry 'out of the Jewish faith'); *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175 ('profess the Jewish faith'). Cf *Re Wolffe's Will Trusts, Shapley v Wolffe* [1953] 2 All ER 697, [1953] 1 WLR 1211 (where a gift on marriage 'to a person of the Jewish faith and the child of Jewish parents' was construed as a limitation which had not taken effect, but, if it was a condition, it was a condition precedent and incapable of fulfilment).

13 See *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16, HL ('not of Jewish parentage and of the Jewish faith'); *Re Blaiberg, Blaiberg and Public Trustee v De Andia Yrarrazaval* [1940] Ch 385, [1940] 1 All ER 632 ('of the Jewish faith'); *Re Donn, Donn v Moses* [1944] Ch 8, [1943] 2 All ER 564 ('of the Jewish faith'); *Re Moss's Trusts, Moss v Allen* [1945] 1 All ER 207 ('not a member of the Jewish faith'); *Re Krawitz's Will Trusts, Krawitz v Crawford* [1959] 3 All ER 793, [1959] 1 WLR 1192 ('practise the Jewish religion'); *Re Walter's Will Trusts, National Provincial Bank Ltd v Board of Guardians and Trustees for Relief of Jewish Poor, Registered* (1962) 106 Sol Jo 221 ('marry in the Jewish faith'; uncertain whether beliefs or formalities in issue).

14 In particular, *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16, HL, was described by Lord Wilberforce in *Blathwayt v Baron Cawley* [1976] AC 397 at 425, [1975] 3 All ER 625 at 636, HL, as 'a particular decision on a condition expressed in a particular way about one kind of religious belief or profession' and as not

laying down any general principle as to the invalidity on the grounds of uncertainty of all conditions subsequent relating to religious belief.

15 *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 at 65, [1978] 1 All ER 1047 at 1056, CA (where Lord Russell of Killowen said: 'I would not . . . destroy a settlement on the supposition that adherence to the Jewish faith is an unintelligible concept'; and Lord Denning MR at 62 and 1054 agreed). See, however, *Re Tepper's Will Trusts, Kramer v Ruda* [1987] Ch 358, [1987] 1 All ER 970 (conditions subsequent that beneficiaries should 'remain within the Jewish faith' and should not 'marry outside the Jewish faith' held to be too uncertain).

16 See *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA (where Lord Denning MR at 62 and 1054 considered this was possible; Eveleigh LJ at 66 and 1057 held that it was not; and Lord Russell of Killowen at 65 and 1056 refused to decide the point). See also *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL; and PARA 429 ante.

17 *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 at 66, [1978] 1 All ER 1047 at 1057, CA, per Eveleigh LJ. Cf *Re Coxen, McCallum v Coxen* [1948] Ch 747, [1948] 2 All ER 492 (cited in PARA 429 note 9 ante).

18 *Carteret v Carteret* (1723) 2 P Wms 132; *Re May, Eggar v May* [1917] 2 Ch 126; *Patton v Toronto General Trusts Corp* [1930] AC 629, PC; *Re May, Eggar v May* [1932] 1 Ch 99. This consideration is sufficient to defeat the suggestion that such clauses in relation to minors may be against public policy by interfering with parental rights and duties, as suggested by Parker J in *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471 at 476-477. See also *Blathwayt v Baron Cawley* [1976] AC 397 at 426-427, [1975] 3 All ER 625 at 636-637, HL, per Lord Wilberforce.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/432. Miscellaneous uncertain conditions.

432. Miscellaneous uncertain conditions.

Requirements that the donee is not to be educated abroad¹ or is to retire to a convent², or is not to associate with certain persons³, or is not to be under the control of his father⁴, or is not to carry on a profession⁵, or is to farm the land devised⁶, have been held uncertain⁷.

Furthermore, conditional future limitations may in truth be conditions subsequent and void for uncertainty if they do not satisfy the rule⁸. There is, however, nothing uncertain in point of operation or contrary to public policy in requiring a person (including a married woman) who is not a peer or, possibly, a peeress⁹ to assume the name, or apply for authority to bear the arms, of another within a limited period¹⁰, although the mode of expression may be too uncertain¹¹. The following conditions imposed on donees have at one time been held to be not uncertain, but such as the court enforces: to give up low company¹²; to 'follow the paths of virtue'¹³; not to dispute the testator's will¹⁴; to marry a person of ample fortune¹⁵; not to marry or live with or misconduct himself with a named person¹⁶; to make a certain estate his home and not to let a named person set foot on the property¹⁷; to make a settlement within six months of the testator's death or on reaching full age or within such further period as the testator's trustees think reasonable¹⁸. A provision that the donee should lose his interest in a certain estate if he became entitled to certain other property or the bulk of it was valid¹⁹. A gift to trustees on trust for a person if he behaves well, and to their satisfaction, may sometimes be construed as giving them only a discretion to deprive him of the gift as a condition subsequent²⁰.

1 *Clavering v Ellison* (1859) 7 HL Cas 707.

2 *Duddy v Gresham* (1878) 2 LR Ir 442, Ir CA.

3 *Jeffreys v Jeffreys* (1901) 84 LT 417; *Re Jones, Midland Bank Executor and Trustee Co Ltd v Jones* [1953] Ch 125, [1953] 1 All ER 357.

4 *Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471.

- 5 *Re Reich, Public Trustee v Guthrie* (1924) 40 TLR 398.
- 6 *Re Hennessy (Richard B)* (1963) 98 ILTR 39.
- 7 In *Re Burke* [1951] IR 216, a condition that the donee should not leave Ireland failed to operate because he had already done so at the testator's death.
- 8 *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158.
- 9 In *Re Drax, Dunsany v Sawbridge* (1906) 94 LT 611, a peeress was held to be required to comply with a name and arms clause by using the name in formal documents but not required to use the name in private documents where surnames were not used by peeresses.
- 10 *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA (disapproving *Re Fry, Reynolds v Denne* [1945] Ch 348, [1945] 2 All ER 205; *Re Lewis' Will Trusts, Whitelaw v Beaumont* [1951] WN 591; *Re Kersey, Alington v Alington* [1952] WN 541; *Re Howard's Will Trusts, Levin v Bradley* [1961] Ch 507, [1961] 2 All ER 413, so far as relating to married women). In Australia, however, a name clause has been struck down on the grounds that it was anachronistic and infringed an individual's right to use the surname of his own choosing: *Littras v Littras* [1995] 2 VR 283, Vict SC. A legal restriction on the choice of surname is not, however, a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS71 (1953); Cmd 8969): Application 18131/91 *Stjerna v Finland* (1994) 24 EHRR 195, ECtHR. As to name and arms clauses generally see SETTLEMENTS vol 42 (Reissue) PARA 745 et seq.
- 11 *Re Murray, Martins Bank Ltd v Dill* [1955] Ch 69, [1954] 3 All ER 129, CA. See also *De Vere's Will Trusts, Jellett v O'Brien* [1961] IR 224 (decided while *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA (see the text and note 10 supra) was under appeal).
- 12 *Tattersall v Howell* (1816) 2 Mer 26.
- 13 *Maud v Maud* (1860) 27 Beav 615.
- 14 *Evanturel v Evanturel* (1874) LR 6 PC 1. As to the constructional limits placed on clauses of this description see PARA 478 post.
- 15 *Re Moore's Trusts, Lewis v Moore* (1906) 96 LT 44.
- 16 *Re Hanlon, Heads v Hanlon* [1933] Ch 254.
- 17 *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v Talbot-Ponsonby* [1937] 4 All ER 309.
- 18 *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193.
- 19 *Bromley v Tyron* [1952] AC 265, [1951] 2 All ER 1058, HL.
- 20 *Kingsman v Kingsman* (1706) 2 Vern 559; *Re Coe's Trust* (1858) 4 K & J 199.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/433. Inconsistent or repugnant conditions.

433. Inconsistent or repugnant conditions.

A condition is said to be repugnant, and is unenforceable, if it is inconsistent with the nature of the interest given to the donee (as, for example, where a restraint on alienation is imposed on a devise in fee), or with other gifts in the will¹, or it may be void as a matter of construction by being inconsistent with the rest of the will². The effect of a partial restriction on alienation, such as a condition not to sell out of the testator's family, is doubtful³. Conditions purporting to hold up payment to donees absolutely entitled in possession may be rejected⁴.

1 *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131 (condition requiring sale at less than real value). See also *Muschamp v Bluett* (1617) J Bridg 132; *Gulliver v*

Vaux (1746) 8 De GM & G 167n; *Bradley v Piexoto* (1797) 3 Ves 324; *Bull v Kingston* (1816) 1 Mer 314; *Cuthbert v Purrier* (1822) Jac 415; *Ware v Cann* (1830) 10 B & C 433; *Byng v Lord Strafford* (1843) 5 Beav 558 at 567; *Holmes v Godson* (1856) 8 De GM & G 152; *Re Thompson* (1896) 44 WR 582; *Crofts v Beamish* [1905] 2 IR 349, Ir CA; *McGowan v Grimes* (1921) 55 ILT 208; *Re Fry, Reynolds v Denne* [1945] Ch 348, [1945] 2 All ER 205; *Re Wenger's Settlement, Wenger v Baldwin* (1963) 107 Sol Jo 981 (condition requiring resettlement); *Re Hennessy (Richard B)* (1963) 98 ILTR 39; and GIFTS vol 52 (2009) PARAS 251, 253. A defeasance clause annexed to a fee tail is defeated by disentailing (*Re Knox* [1912] 1 IR 288), although entailed interests cannot be created by instruments coming into operation on or after 1 January 1997 (see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 606, 676). An absolute gift may be read together with the condition and be cut down by it: *Re Sax* (1883) 68 LT 849. A gift over is void if it defeats or abridges an estate in fee by altering the course of its devolution, and is to take effect at the moment of devolution, and at no other time, or is to defeat an estate and to take effect on the exercise of any of the rights incident to that estate: *Shaw v Ford* (1877) 7 ChD 669 at 673-674 per Fry J. Thus a gift over cannot be made to defeat a prior gift on alienation by the prior donee (cf SETTLEMENTS vol 42 (Reissue) PARA 915 et seq), or on partition between two or more prior donees (*Shaw v Ford* supra), or on non-alienation (*Shaw v Ford* supra; *Re Beetlestone, Beetlestone v Hall* (1907) 122 LT Jo 367), such as devolution on intestacy (see eg *Gulliver v Vaux* supra; *Cuthbert v Purrier* supra; *Ware v Cann* supra; *Holmes v Godson* supra), or on forfeiture to the Crown (*Re Wilcocks' Settlement* (1875) 1 ChD 229).

2 In *Charles v Barzey* [2002] UKPC 68, [2003] 1 WLR 437, the gift in a will of the right to the use of a storeroom in a property was held not to be repugnant to a gift of the property itself. As to inconsistency in the will see PARAS 542, 666 post.

3 See *Muschamp v Bluett* (1617) J Bridge 132; *Attwater v Attwater* (1853) 18 Beav 330; *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801; *Re Brown, District Bank Ltd v Brown* [1954] Ch 39, [1953] 2 All ER 1342 (void). Cf *Doe d Gill v Pearson* (1805) 6 East 173; *Re Macleay* (1875) 20 Eq 186 (valid).

4 See PARA 437 post.

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434. Impossible conditions.

The law as to impossible conditions is derived, in the case of realty, from the common law and, in the case of personalty, from the civil law. The authorities seem to support the following propositions:

- 30 (1) where the condition is a condition precedent and the gift is of realty, and the condition is impossible for whatever reason, the performance of the condition is not excused and the gift does not vest¹;
- 31 (2) where the condition is a condition precedent and the gift is of personalty, and the condition is originally impossible², or is subsequently made so by the testator's act or default³, the condition is rejected and the gift is absolute;
- 32 (3) where the performance of the condition is the sole motive of the gift⁴, or the impossibility was unknown to the testator⁵, or the condition which was possible at the time of its creation has since become impossible by an act of God⁶, the civil law agrees with the common law in holding both gift and condition void⁷;
- 33 (4) where the condition is a condition subsequent, then, whether the gift is of realty⁸ or personalty⁹, the condition is rejected and the gift is absolute¹⁰.

The impossibility in these cases must be in the nature of things¹¹. A condition is not void merely because its performance is highly improbable¹², or because it is out of the power of the donee, or even out of any human power¹³, to ensure its performance.

1 Shep Touch (8th Edn) 132-133; Roper on Legacies (4th Edn) p 754; *Roundel v Curren* (1786) 2 Bro CC 67; *Re Turton, Whittington v Turton* [1926] Ch 96 (where the impossibility was due to the acts of the testator).

2 *Lowther v Cavendish* (1758) 1 Eden 99 at 117 (affd sub nom *Lord Charles Cavendish v Lowther* (1759) 3 Bro Parl Cas 186); *Re Thomas's Will Trust, Powell v Thomas* [1930] 2 Ch 67; but see *Re Elliott, Lloyds Bank Ltd v Burton-on-Trent Hospital Management Committee* [1952] Ch 217, [1952] 1 All ER 145 (where *Re Thomas's Will Trust, Powell v Thomas* supra was doubted on the ground that the impossibility was unknown to the testator). A direction to accumulate income may be void owing to the reason for it not becoming operative: *Re Thornber, Crabtree v Thornber* [1937] Ch 29, [1936] 2 All ER 1594, CA. See also *Re Parrott, Cox v Parrott* [1946] Ch 183, [1946] 1 All ER 321 (where it was held that a condition that a Christian name be assumed by deed poll is impossible).

3 *Darley v Langworthy* (1744) 3 Bro Parl Cas 359; *Gath v Burton* (1839) 1 Beav 478; *Walker v Walker* (1860) 2 De GF & J 255. See also *Yates v University College, London* (1873) 8 Ch App 454 at 461 (affd (1875) LR 7 HL 438, on the ground that there was no condition at all); *Re Williams, Taylor v University of Wales* (1908) 24 TLR 716; *Re Chambers, Watson v National Children's Home* [2001] WTLR 1375 (gift of half of estate to a charity on condition that it would look after the testator's domestic pets with a gift over on default; testator had no pets at death; gift to charity upheld).

4 *Re Wolfe's Will Trusts, Shapley v Wolfe* [1953] 2 All ER 697, [1953] 1 WLR 1211.

5 *Re Wolfe's Will Trusts, Shapley v Wolfe* [1953] 2 All ER 697, [1953] 1 WLR 1211; *Re Elliott, Lloyds Bank Ltd v Burton-on-Trent Hospital Management Committee* [1952] Ch 217, [1952] 1 All ER 145.

6 *Dawson v Oliver-Massey* (1876) 2 ChD 753 at 755 per Jessel MR (revsd on another point (1876) 2 ChD 756, CA); *Priestley v Holgate* (1857) 3 K & J 286. As to what constitutes an act of God see CONTRACT vol 9(1) (Reissue) PARA 907.

7 See *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 at 128, CA (where, however, the condition was illegal).

8 *Shep Touch* (8th Edn) 132-133; *Thomas v Howell* (1692) 1 Salk 170; *Bunbury v Doran* (1875) IR 9 CL 284 at 286, Ir Ex Ch; *Re Greenwood, Goodhart v Woodhead* [1903] 1 Ch 749, CA; *Re Croxon, Croxon v Ferrers* [1904] 1 Ch 252; *Re Berens, Re Dowdeswell, Berens-Dowdeswell v Holland-Martin* [1926] Ch 596. A condition subsequent (a defeasance clause) was held to fail where it was subject to an overriding condition which could not have been carried out: *Re Jones, Williams v Rowlands* [1948] Ch 67, [1947] 2 All ER 716 (failure of trustees to buy land on which donees were required to build hall).

9 *Collett v Collett* (1866) 35 Beav 312. See also *Graydon v Hicks* (1739) 2 Atk 16; *Dawson v Oliver-Massey* (1876) 2 ChD 753 at 755 per Jessel MR (revsd on another point (1876) 2 ChD 756, CA); *Re Bird, Bird v Cross* (1894) 8 R 326.

10 *le as in Watson v National Children's Home* [1995] 37 LS Gaz R 24 (condition that donee should take care of testator's pets impossible of performance because all the testator's pets had predeceased him).

11 *Franco v Alvares* (1746) 3 Atk 342 (to go from London to Rome in three hours). As to the effect of changing circumstances see *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 at 533 per Byrne J.

12 *Re Knox, von Scheffler v Shuldharn* [1912] 1 IR 288 (where a condition as to naturalisation was not impossible because a private Act of Parliament might have been obtained).

13 See Com Dig, Condition (D2), cited in *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 22n.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/435. Conditions nullified or dispensed with by testator.

435. Conditions nullified or dispensed with by testator.

Where, by reason of the acts of the testator or other events, subsequent to the date of the will, a condition imposed by the will is substantially performed or is nullified in the testator's lifetime, the donee will not be bound by it¹. The result is substantially the same where the testator has dispensed with the condition or has put performance out of the power of the

donee². It seems, however, that this rule does not apply where the condition is precedent and attached to a gift of realty, and that in that case the gift will fail³.

1 See *Wedgwood v Denton* (1871) LR 12 Eq 290 at 296.

2 *Darley v Langworthy* (1774) 3 Bro Parl Cas 359 (bequest of chattels at B conditional on residence; and a subsequent conveyance by the testator of B); *Smith v Cowdery* (1825) 2 Sim & St 358 (condition against marrying T; marriage with T by consent of testator); *Gath v Burton* (1839) 1 Beav 478 (condition requiring payment of debt; satisfied by testator accepting composition); *Violett v Brookman* (1857) 5 WR 342 (condition against disputing father's will; acquiescence by testator in his lifetime in revaluation of father's estate); *Walker v Walker* (1860) 2 De GF & J 255 (condition requiring conveyance by donee; purchase by testator of donee's interest); *Re Park, Bott v Chester* [1910] 2 Ch 322 (marriage with testator's consent); *Re Grove, Public Trustee v Dixon* [1919] 1 Ch 249 (condition for transfer of daughter's shares under a settlement to be held on same trusts as trusts of will; condition impracticable to testator's knowledge and, therefore, discharged). As to a condition requiring a consent to marriage see PARA 426 ante. There are remarks in some cases suggesting that the true principle is not that the condition is considered to have been fulfilled, but that the donees are exempt from the condition altogether, so that the will must be read as if there were no condition (*Re Park, Bott v Chester* supra at 327 per Parker J), but this is doubtful. As to subsequent events see PARA 440 post. Where there was a specific devise on condition of continuing the testator's business, and the testator gave up the business, it was held on the construction of the will that the devise did not take effect and the land fell into residue: *Re Turton, Whittington v Turton* [1926] Ch 96.

3 *Re Turton, Whittington v Turton* [1926] Ch 96.

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436. Other grounds of excuse.

The donee may be excused from performing a condition by the act of the court¹, or on grounds of public policy² in some cases where the condition is subsequent and where on account of the minority³ or marriage⁴ of the donee, or of his public duties, he is not free to perform the condition⁵. The donee is not, however, excused by his own ignorance of a condition⁶, unless in the circumstances of the case a duty to give him notice is imposed on a person interested⁷, or by his own acts rendering it impossible for him to perform the condition⁸, or (except as previously mentioned) by his minority or other disability⁹.

1 *Croskery v Ritchie* [1901] 1 IR 437 (sale by court order).

2 See *Re Wenger's Settlement, Wenger v Baldwin* (1963) 107 Sol Jo 981 (where it was said that a condition as to resettlement by grandchildren was probably void on the grounds of public policy as being an attempt to circumvent the rule against perpetuities). As to conditions which are void on the grounds of public policy see PARA 422 ante.

3 Eg, in the case of conditions subsequent requiring an act of volition, where the persons to whom a minor's legal custody and care are committed do not choose that he should conform. A minor cannot, therefore, be said to refuse or neglect to reside at a place (*Partridge v Partridge* [1894] 1 Ch 351, following *Parry v Roberts* (1871) 19 WR 1000), or to refuse or neglect to take a name and arms (*Re Edwards, Lloyd v Boyes* [1910] 1 Ch 541). See also note 9 infra. Cf *Bevan v Mahon-Hagan* (1892) 27 LR Ir 399 (condition precedent). It may be open to a minor to comply with a condition relating to religion on reaching his majority: see PARA 431 note 18 ante.

4 Thus a married woman may be excused from a condition as to her residence, or as to her return to England, if she can comply with the condition only by separating from her husband: *Wilkinson v Wilkinson* (1871) LR 12 Eq 604; *Re Wilkinson, Page v Public Trustee* [1926] Ch 842; and see *Woods v Townley* (1853) 11 Hare 314.

5 *Re Adair* [1909] 1 IR 311 (absence on military service no breach of condition requiring residence); *Brannigan v Murphy* [1896] 1 IR 418 (parish priest's duties).

6 Eg a condition requiring a certain act to be done within a certain time, as claiming the legacy (*Fry v Porter* (1670) 1 Mod Rep 300; *Lady Anne Fry's Case* (1674) 1 Vent 199; *Burgess v Robinson* (1817) 3 Mer 7; *Hawkes v Baldwin* (1838) 9 Sim 355; *Re Hodges' Legacy* (1873) LR 16 Eq 92; *Powell v Rawle* (1874) LR 18 Eq 243; *Astley v Earl of Essex* (1874) LR 18 Eq 290). But see now *Re Bowles*, *Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] Ch 422, [2003] 2 All ER 387, in which it was held (not following *Re Avar*, *Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548) that an option to purchase property within three months of the testator's death at the value agreed between the executors and the Capital Taxes Office did not lapse if the value was not agreed within that period. See also *Re Gray*, *Allardyce v Roebuck* [2004] EWHC 1538 (Ch), [2004] 3 All ER 754, [2004] WTLR 779 (option to purchase; will specifying periods for acceptance and completion; time for acceptance of the essence, but time for completion not of the essence). For the meaning of 'neglect or refuse' see *Re Quintin Dick*, *Lord Cloncurry v Fenton* [1926] Ch 992; and for the meaning of 'neglect' see *Re Hughes*, *Rea v Black* [1943] Ch 296, [1943] 2 All ER 269.

7 *Lady Anne Fry's Case* (1674) 1 Vent 199 at 201. The executor is under no obligation to disclose the condition, even where he takes a benefit under it by way of gift over: *Re Lewis*, *Lewis v Lewis* [1904] 2 Ch 656, CA. See also *Chauncy v Graydon* (1743) 2 Atk 616. As to the difference between the duty of disclosure of an executor and that of a trustee of an express trust see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 475; TRUSTS vol 48 (2007 Reissue) PARA 962.

8 See *Philips v Walter* (1720) 2 Bro Parl Cas 250.

9 *Lady Anne Fry's Case* (1674) 1 Vent 199 at 200. Thus a minor (except as mentioned in note 3 supra) is bound by a condition, eg as to taking a name and arms: *Whittingham's Case* (1603) 8 Co Rep 42b at 44b; *Bevan v Mahon-Hagan* (1892) 27 LR Ir 399. See also *Doe d Luscombe v Yates* (1822) 5 B & Ald 544 (condition held substantially complied with by a minor); *Ledward v Hassells* (1856) 2 K & J 370 (condition as to giving a discharge). As to performance by or on behalf of a person mentally disordered see *Re Earl of Sefton* [1898] 2 Ch 378; *Re Crumpe*, *Orpen v Moriarty* [1912] 1 IR 485; and MENTAL HEALTH. As to the possible invalidity of name clauses in modern circumstances see PARA 432 note 10 ante.

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437. Conditions not binding on donee.

A condition may be ineffectual as against the donee. Thus where there is a direction that a donee is not to enjoy a vested gift in full until he attains a particular age, then, unless there is in the will or some codicil to it a clear indication of intention not only that the donee is not to have the enjoyment of the gift until attaining that age, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the donee up to the time of attaining that age as to induce the court to hold that as to the previous income there is an intestacy, the court, on the application of the donee (if he is entitled to give a discharge for the gift) or the person deriving title under him, will strike that direction out of the will¹.

The person entitled under a gift over on non-performance of the condition may, it seems, release the donee from the condition². No one who intentionally prevented a condition from being performed may take advantage of the non-performance³.

If a legacy is given on a valid condition subsequent that the donee does or abstains from doing any specified act, the court may order payment of the legacy to the donee, but may require security for the observance of the condition⁴. If, however, the condition refers to no act or default of the donee, he may be entitled to payment without giving security⁵. In each case, however, the court gives effect to the testator's intentions, which may modify or exclude these rules⁶.

1 *Gosling v Gosling* (1859) John 265 at 272 per Wood V-C (adopted in *Wharton v Masterman* [1895] AC 186 at 192, HL, per Lord Herschell LC); *Re Thompson*, *Griffith v Thompson* (1896) 44 WR 582; *Re Couturier*, *Couturier v Shea* [1907] 1 Ch 470 at 473; *Re Hendy*, *Hayes v Hendy* [1913] VLR 559. See also *Saunders v Vautier* (1841) Cr & Ph 240; and PARA 711 et seq post. Cf *Berry v Green* [1938] AC 575, sub nom *Re Blake*, *Berry v Geen* [1938] 2 All ER 362, HL (where *Wharton v Masterman* supra was distinguished).

2 See *Ex p Palmer* (1852) 5 De G & Sm 649.

3 Co Litt 206b; *Viscount Falkland v Bertie* (1698) 2 Vern 333 at 344; *Simpson v Vickers* (1807) 14 Ves 341 at 346. See also *Mesgrett v Mesgrett* (1706) 2 Vern 580.

4 *Aston v Aston* (1703) 2 Vern 452; *Colston v Morris* (1821) 6 Madd 89.

5 *Griffiths v Smith* (1790) 1 Ves 97; *Fawkes v Gray* (1811) 18 Ves 131. See also *Madill v Madill* (1907) 26 NZLR 737, NZ CA.

6 Thus the testator may expressly direct an undertaking to be given (see eg *Roche v M'Dermott* [1901] 1 IR 394; *Re Lester, Burton v Lester* (1906) 7 SRNSW 58), and the fact that trustees have the legal estate and active duties in relation to the property may prevent the donee from obtaining a transfer (*Polson v Polson* (1900) 21 NSWLR Eq 90).

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438. Substantial performance of conditions.

Literal compliance with a condition may be necessary, if the terms of the condition are clear, and if it is capable of being literally complied with¹. However, in many cases, particularly with regard to conditions requiring a consent to marriage, the court may hold a condition satisfied where it has been complied with substantially², although not precisely³, whether the condition is precedent or subsequent⁴; but a condition to operate as a defeasance of a vested estate must be shown to have happened strictly and to the letter⁵. A condition requiring the donee to claim the legacy may be sufficiently complied with by an order in a claim for administration, even though the donee is not a party⁶, but not, it seems, by a mere order on a claim form not asking for general administration⁷. A condition requiring the donee to give a good discharge may similarly be sufficiently performed by bringing a claim⁸.

There may be cases where, in the circumstances, an attempted or inchoate performance is sufficient⁹, but this is not the general rule, even though the completion of the performance is prevented by the death of the donee or other act of God¹⁰.

1 *Caldwell v Cresswell* (1871) 6 Ch App 278. See also *Brown v Peys* (1594) Cro Eliz 357. Where a gift to a housekeeper was subject to a condition that she should continue in the service of the testatrix's husband until his death, the condition was literally fulfilled, even though the husband married the housekeeper: *Re Kendrew, Hird v Kendrew* [1953] Ch 291, [1953] 1 All ER 551, CA.

2 As to consent to marriage see PARA 426 ante. See generally *Lord Mohun v Duke of Hamilton* (1703) 2 Bro Parl Cas 239, HL (legacy provided that legatee gave no trouble to executor; release by legatee sufficient); *Scarlett v Lord Abinger* (1865) 34 Beav 338 (condition for settlement of the donee's own estates on trusts of doubtful validity and effect; settlement in general terms on intended beneficiaries sufficient); *Galwey v Barden* [1899] 1 IR 508 (entering on a calling). Cf *Schnell v Tyrrell* (1834) 7 Sim 86 (remaining in England); *Re Stone's Trusts* (1866) 12 Jur NS 447 (claim within time made by third person); *Re Arbib and Class's Contract* [1891] 1 Ch 601, CA (return to England; temporary visit sufficient); *Re Macnamara, Hewitt v Jeans* (1911) 104 LT 771 (benefice not to be held in plurality; union of benefices no breach); *Browne v Browne* [1912] 1 IR 272; *Re Grotrian, Cox v Grotrian* [1955] Ch 501, [1955] 1 All ER 788 (declaration of peace; termination of state of war sufficient); but see *Re Sax, Bamed v Sax* (1893) 68 LT 849 ('cease to carry on the business'; sale to company, donees serving as managing directors, not sufficient). As to what is sufficient compliance with a name and arms clause see SETTLEMENTS vol 42 (Reissue) PARAS 745-746. As to what is sufficient compliance with a condition as to residence see *Re Moir, Warner v Moir* (1884) 25 ChD 605 (condition as to residence fulfilled by keeping an establishment); and SETTLEMENTS vol 42 (Reissue) PARA 741.

3 Co Litt 206a; *Popham v Bampfeild* (1682) 1 Vern 79 at 83; *Daley v Desbouverie* (1738) 2 Atk 261; *Clarke v Parker* (1812) 19 Ves 1 at 24; *Re Smith, Keeling v Smith* (1890) 44 ChD 654 (conditions with respect to marriage). See also *Tanner v Tebbutt* (1843) 2 Y & C Ch Cas 225 (establishment of identity of donee).

- 4 *Popham v Bampfild* (1682) 1 Vern 79; *Worsley v Wood* (1796) 6 Term Rep 710 at 719, 722; *Dawson v Oliver-Massey* (1876) 2 ChD 753, CA (conditional gift on marriage with consent of parents, one dead).
- 5 *Hervey-Bathurst v Stanley, Craven v Stanley* (1876) 4 ChD 251 at 272, CA.
- 6 *Tollner v Marriott* (1830) 4 Sim 19.
- 7 *Re Hartley, Stedman v Dunster* (1887) 34 ChD 742.
- 8 *Franco v Alvares* (1746) 3 Atk 342; *Ledward v Hassells* (1856) 2 K & J 370.
- 9 *Re Conington's Will* (1860) 6 Jur NS 992.
- 10 *Tulk v Houlditch* (1813) 1 Ves & B 248. See also *Roundel v Curren* (1786) 2 Bro CC 67 (and see 1 Swan 383n); *Priestley v Holgate* (1857) 3 K & J 286. As to what constitutes an act of God see CONTRACT vol 9(1) (Reissue) PARA 907.

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439. Time of performance.

Where the testator has prescribed a period within which a condition must be performed, this period must be strictly observed¹, subject to the jurisdiction, if any, of the court to grant relief from forfeiture². If, however, the testator has not prescribed such a period and the condition is one to be performed by the donee personally, not requiring the intervention or concurrence of any other person, the period for the performance of the condition is necessarily the life of the donee and no longer, and the condition is not complied with if the donee dies without having performed it³. Where persons other than the donee are to be benefited, the period allowed is, as a rule, a reasonable period⁴.

1 *Simpson v Vickers* (1807) 14 Ves 341 (conditions as to giving a release within a fixed time); *Brooke v Garrod* (1857) 2 De G & J 62 (option to purchase); *Re Goldsmith, Brett v Bingham* [1947] Ch 339, [1947] 1 All ER 451 (payment to testator's estate). But see now *Re Bowles, Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] Ch 422, [2003] 2 All ER 387 (option to purchase; strict observance of time limit would have defeated testator's intentions; other beneficiaries not prejudiced by time not being of the essence), not following *Re Avar, Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548 (option to purchase). See also *Re Gray, Allardyce v Roebuck* [2004] EWHC 1538 (Ch), [2004] 3 All ER 754, [2004] WTLR 779 (option to purchase; will specifying periods for acceptance and completion; time for acceptance of the essence, but not time for completion). See further *Austin v Tawney* (1867) 2 Ch App 143; *Re Glubb, Bamfield v Rogers* [1900] 1 Ch 354, CA; *Re Knox, Von Scheffler v Shuldham* [1912] 1 IR 288 (naturalisation within two years); and PARA 436 note 6 ante. As to how the time is computed see *Lester v Garland* (1808) 15 Ves 248; *Gorst v Lowndes* (1841) 11 Sim 434; *Miller v Wheatley* (1891) 28 LR Ir 144; *Re Figgis, Roberts v MacLaren* [1969] 1 Ch 123, [1968] 1 All ER 999. In *Re Packard, Packard v Waters* [1920] 1 Ch 596, where there was a condition to settle a legacy within a year of the testator's death, but no gift over on non-compliance, the limit of time was held not to be of the essence of the condition. As to a condition to assume a name see *Re Finlay, Dinamore v Finlay* [1932] NI 89; *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643 at 691, [1962] 2 All ER 335 at 361, CA. The court has to consider, at any rate in the absence of a gift over, what the testator presumably intended to guard against in imposing the condition: *Re Goodwin, Ainslie v Goodwin* [1924] 2 Ch 26.

2 See PARA 440 post.

3 *Acherley v Vernon* (1739) Willes 153; *Patching v Barnett* (1881) 51 LJ Ch 74, CA; *Re Greenwood, Goodhart v Woodhead* [1902] 2 Ch 198 at 204-205 per Joyce J (revsd on construction [1903] 1 Ch 749, CA). Thus in the case of a gift conditional on marriage with, or with the consent of, a particular person, the donee has his whole life to perform the condition: *Randal v Payne* (1779) 1 Bro CC 55; *Fitzgerald v Ryan* [1899] 2 IR 637 at 652, 654. See also *Beaumont v Squire* (1852) 17 QB 905 at 933, 936 (criticising *Clifford v Beaumont* (1828) 4 Russ 325).

4 *Huckstep v Mathews* (1685) 1 Vern 362; *Davies v Lowndes* (1835) 1 Bing NC 597 at 618. Cf the rules as to time of performance of a contract: see CONTRACT vol 9(1) (Reissue) PARA 928 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(3) CONDITIONS ATTACHED TO GIFTS/440. Relief against conditions.

440. Relief against conditions.

In certain cases the court¹ may grant a donee relief against a condition precedent², or against forfeiture under a condition subsequent, as, for example, where performance has been prevented by the contrivance of the executors³, or other persons interested⁴, and by no fault of the donee⁵, or where the condition is in the nature of a penalty⁶, and also in the case of conditions relating to matters such as the payment of legacies or other sums⁷, or the release of claims⁸. The court gives relief where performance has not been made within the time required by the testator but the parties can be placed in the same situation as if the condition had been strictly performed⁹. The court does not, however, give relief, even in the cases mentioned above, where there is a gift over¹⁰ to any person other than the one who would take by operation of law¹¹, and except in such cases the court cannot give relief at all¹².

1 Formerly, the jurisdiction of a court of law to hold a condition substantially performed was not so wide as the equitable jurisdiction to give relief against non-performance: *Clarke v Parker* (1812) 19 Ves 1 at 21-22.

2 *Wallis v Crimes* (1667) 1 Cas in Ch 89 at 90; *Hayward v Angell* (1683) 1 Vern 222; *Woodman v Blake* (1691) 2 Vern 222; *Viscount Falkland v Bertie* (1698) 2 Vern 333 at 339. For the general rule that conditions must be strictly observed see EQUITY vol 16(2) (Reissue) PARA 806. See, however, *Re Bowles*, *Hayward v Jackson* [2003] EWHC 253 (Ch), [2003] Ch 422, [2003] 2 All ER 387 (not following *Re Avar*, *Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548); *Re Gray*, *Allardyce v Roebuck* [2004] EWHC 1538 (Ch), [2004] 3 All ER 754, [2004] WTLR 779. As to conditions precedent and subsequent see PARA 420 ante.

3 *Brooke v Garrod* (1857) 2 De G & J 62. Failure by trustees to carry out the terms of the testator's will is not allowed to prejudice the beneficiaries: *Re Jones*, *Williams v Rowlands* [1948] Ch 67, [1947] 2 All ER 716 (cited in PARA 434 note 8 ante).

4 Eg persons interested under the gift over (*Viscount Falkland v Bertie* (1698) 2 Vern 333 at 343; and see *D'Aguilar v Drinkwater* (1813) 2 Ves & B 225), or under a prior gift (*Hayes v Hayes* (1674) Cas temp Finch 231).

5 *Clarke v Parker* (1812) 19 Ves 1 at 17 per Lord Eldon LC.

6 *Wallis v Crimes* (1667) 1 Cas in Ch 89; *Priestley v Holgate* (1857) 3 K & J 286 at 288.

7 *Paine v Hyde* (1841) 4 Beav 468. Where the heir had entered on breach of condition by the devisee to pay a legacy, the court gave relief to the devisee on payment of the legacy: *Underwood v Swain* (1649) 1 Rep Ch 161; *Barnardiston v Fane* (1699) 2 Vern 366; *Grimston v Lord Bruce* (1707) 1 Salk 156. As to the construction of such conditions see PARA 691 post; and as to persons entitled to take advantage of them see PARA 437 ante. A condition may raise a case of election: see *Re Burton's Settlements*, *Scott v National Provincial Bank Ltd* [1955] Ch 82 at 101, [1954] 3 All ER 193 at 204; and POWERS vol 36(2) (Reissue) PARA 368.

8 *Hayward v Angell* (1683) 1 Vern 222; *Taylor v Popham* (1782) 1 Bro CC 168; *Simpson v Vickers* (1807) 14 Ves 341; *Hollinrake v Lister* (1826) 1 Russ 500 at 508.

9 *Hollinrake v Lister* (1826) 1 Russ 500 at 508; *Re Packard*, *Packard v Waters* [1920] 1 Ch 596 at 603; *Re Selinger's Will Trusts*, *Midland Bank Executor and Trustee Co Ltd v Levy* [1959] 1 All ER 407, [1959] 1 WLR 217. See also *Re Sage*, *Lloyds Bank Ltd v Holland* [1946] Ch 332, [1946] 2 All ER 298 (settlement). Cf *Re Goldsmith*, *Brett v Bingham* [1947] Ch 339, [1947] 1 All ER 451.

10 A mere clause of revocation, it appears, does not amount to a gift over for this purpose (*Simpson v Vickers* (1807) 14 Ves 341), nor does an express revocation of the gift for non-compliance (*Re Selinger's Will Trusts*, *Midland Bank Executor and Trustee Co Ltd v Levy* [1959] 1 All ER 407, [1959] 1 WLR 217).

11 *Simpson v Vickers* (1807) 14 Ves 341 at 346. See also *Cage v Russel* (1681) 2 Vent 352.

12 Eg against forfeiture under a condition as to marriage with consent: *Ashton v Ashton* (1703) Prec Ch 226; *Dashwood v Lord Bulkeley* (1804) 10 Ves 230 at 239; *Clarke v Parker* (1812) 19 Ves 1.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(4) ACCEPTANCE AND DISCLAIMER/441. Acceptance.

(4) ACCEPTANCE AND DISCLAIMER

441. Acceptance.

If the donee of a gift by will accepts the gift, he takes it with all the benefits and burdens which are incident to it by law¹, or which are validly attached to it by the testator, and, in particular, he takes it with the burden of all the conditions and obligations validly attached to it which are intended to be binding on him². It is a question of construction in each case whether the words of the condition create a charge³ or a personal obligation⁴ or both⁵. Unless the conditions are such that only a trust or charge on the property is created⁶, or that the donee is entitled to the enjoyment of the gift only during such period as the conditions are performed by him⁷, the donee, on accepting the gift, is bound to observe and perform the conditions⁸, the obligation which lies on him being the same as if he had entered into a contract to do so⁹. Thus where the condition requires him to do some act involving expense, he is, if he accepts the gift, personally liable for that act being done, even though the gift is insufficient to enable him to do so without loss¹⁰.

In general, and subject to the terms of the will¹¹, acceptance may be made by or inferred from informal acts or conduct¹², especially if they amount to acts of ownership¹³. The donee need not expressly accept the gift¹⁴; unless by the will the duty of doing some act to show his election is put on him¹⁵, his acceptance of the gift is presumed, and the property vests in him unless and until he disclaims¹⁶.

1 As to interest and accretions on legacies see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 499 et seq. As to the administration of assets, the payment of debts, and the liability of the donee, see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 374 et seq.

2 *Pitman v Crum Ewing* [1911] AC 217, HL; *Messenger v Andrews* (1828) 4 Russ 478 (where the plaintiff claimed to be in possession not by virtue of the bequest but in satisfaction of money advanced, and an inquiry was ordered whether he accepted); *Hickling v Boyer* (1851) 3 Mac & G 635 (covenants and conditions of lease). See also note 9 infra. As to conditions attached to gifts see PARA 419 et seq ante. As to the burden of incumbrances see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 424-428. As to acceptance of office by a trustee see TRUSTS vol 48 (2007 Reissue) PARAS 808-811. A legatee who, in pursuance of a condition attached to the legacy, conveys his own land to another has no lien for his legacy on the land conveyed: *Barker v Barker* (1870) LR 10 Eq 438. As to a direction attached to an estate tail for assuming a name and arms see *Vandeleur v Sloane* [1919] 1 IR 116, Ir CA. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 606, 676. For conditions requiring the assumption of a name or arms see PARA 432 text and notes 10-11 ante.

3 *Jillard v Edgar* (1849) 3 De G & Sm 502; *Re Cowley, Souch v Cowley* (1885) 53 LT 494; *Re Oliver, Newbald v Beckett* (1890) 62 LT 533.

4 *Rees v Engelback* (1871) LR 12 Eq 225; *Re M'Mahon, M'Mahon v M'Mahon* [1901] 1 IR 489, Ir CA; *Re Loom, Fulford v Reversionary Interest Society Ltd* [1910] 2 Ch 230; *Duffy v Duffy* [1920] 1 IR 122, Ir CA; *Re Hodge, Hodge v Griffiths* [1940] Ch 260; *Re Lester, Lester v Lester* [1942] Ch 324, [1942] 1 All ER 646 (where the authorities are reviewed).

5 *Welby v Rockcliffe* (1830) 1 Russ & M 571; *Wright v Wilkin* (1860) 7 Jur NS 441.

6 See the cases cited in note 3 supra.

7 *Re Robinson, Wright v Tugwell* [1892] 1 Ch 95. See also *A-G v Christ's Hospital* (1830) 1 Russ & M 626 at 628 (where the existence of a gift over did not authorise non-performance). Cf, however, *Re Tyler, Tyler v Tyler*

[1891] 3 Ch 252, CA; *Re Da Costa, Clarke v Church of England Collegiate School of St Peter* [1912] 1 Ch 337 (devise of absolute interest subject to condition; condition obnoxious to rule against perpetuities).

8 *Earl of Northumberland v Marquis of Granby* (1760) 1 Eden 489 at 499, also reported sub nom *Earl of Northumberland v Earl of Aylesford* Amb 540 (affd sub nom *Duke of Northumberland v Lord Egremont* (1768) Amb 657); *A-G v Christ's Hospital* (1790) 3 Bro CC 165 (condition of maintaining six children; rents insufficient); *Messenger v Andrews* (1828) 4 Russ 478 (in 'consideration of' paying debts etc; property insufficient); *A-G v Christ's Hospital* (1830) 1 Russ & M 626 at 628 (condition of maintaining four children); *Re Skingley* (1851) 3 Mac & G 221 (condition of keeping house in repair); *Gregg v Coates, Hodgson v Coates* (1856) 23 Beav 33; *Woodhouse v Walker* (1880) 5 QBD 404 at 408 (where the decision is based on liability at common law, but is criticised and explained in *Blackmore v White* [1899] 1 QB 293 at 303-304); *Re Williamses, Andrew v Williamses* (1885) 54 LT 105, CA; *Blackmore v White* supra; *Dingle v Coppen, Coppen v Dingle* [1899] 1 Ch 726 at 733; *Jay v Jay* [1924] 1 KB 826 (where the basis of the liability of the estate of a deceased tenant for life for non-repair is discussed). Cf *Joliffe v Twyford* (1858) 26 Beav 227; *Duffy v Duffy* [1920] 1 IR 122, Ir CA (devise of farm; devisee to pay debts; residue exonerated). As to the liability of a life tenant subject to a condition for repair of the settled property see SETTLEMENTS vol 42 (Reissue) PARA 986. As to observing the scheme of the will as to a charitable legacy where the trustees have a discretion see *Re Harrison, Harrison v A-G* (1915) 85 LJ Ch 77; and CHARITIES vol 8 (2010) PARA 145.

9 *Gregg v Coates, Hodgson v Coates* (1856) 23 Beav 33 at 38; *Blackmore v White* [1899] 1 QB 293 at 304. The acceptance may also operate to bind the donee by way of estoppel in favour of third persons, eg persons to whom by the condition he is bound to give a release: *Egg v Devey* (1847) 10 Beav 444. See also *Robertson v Junkin* (1896) 26 SCR 192 at 195-196.

10 The court will not order specific performance: *Payne v Haine* (1847) 16 M & W 541; *Re Skingley* (1851) 3 Mac & G 221; *Gregg v Coates, Hodgson v Coates* (1856) 23 Beav 33; *Cooke v Cholmondeley* (1858) 4 Drew 326.

11 The will may require a written acceptance: *Evans v Stratford* (1864) 2 Hem & M 142.

12 *Earl of Northumberland v Marquis of Granby* (1760) 1 Eden 489, sub nom *Earl of Northumberland v Earl of Aylesford* Amb 540; affd sub nom *Duke of Northumberland v Lord Egremont* (1768) Amb 657.

13 See *Bence v Gilpin* (1868) LR 3 Exch 76. Acts done by a donee merely to preserve the property and not amounting to acts of ownership need not amount to acceptance: *A-G v Andrew* (1798) 3 Ves 633. See also *Stacey v Elph* (1833) 1 My & K 195.

14 *Thompson v Leach* (1690) 2 Vent 198 (on appeal (1692) 2 Vent 208, HL); *Townson v Tickell* (1819) 3 B & Ald 31 at 37. See also *Stratton's Deed of Disclaimer, Stratton v IRC* [1958] Ch 42, [1957] 2 All ER 594, CA; and GIFTS vol 52 (2009) PARA 248.

15 Eg in the case of options to purchase: see PARA 416 ante.

16 *Townson v Tickell* (1819) 3 B & Ald 31 at 36-37; *Shep Touch* (8th Edn) 284; *Re Arbib and Class's Contract* [1891] 1 Ch 601, CA. See also *Re Defoe* (1882) 2 OR 623; and GIFTS vol 52 (2009) PARA 250. Acceptance is thus presumed for the purpose of the property vesting in the donee, even if he had no knowledge of the will, but in that case, it appears, not for the purpose of his incurring liabilities: *Houghton v Bell* (1892) 23 SCR 498, 508 (liability as trustee).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(4) ACCEPTANCE AND DISCLAIMER/442. Disclaimer.

442. Disclaimer.

Disclaimer of a gift by will may be made by any person who is sui juris¹. Similarly, the object of a discretionary trust or power may release the trustees from the duty of considering whether or not to exercise their discretion in his favour, and, if he does so, he will cease to be an object of that trust or power². A disclaimer executed prior to the death of the testator is ineffective³.

A disclaimer puts a donee, as regards his liabilities, burdens and rights, in the same position as if no gift had been made to him, but does not necessarily render the gift void in regard to all persons and for all purposes⁴, as, for example, where the donee is a trustee⁵. One of several

joint tenants cannot make a disclaimer, the only disclaimer which joint tenants can make being one made by all of them⁶.

A disclaimer does not operate as a disposition of property but as a non-acceptance of it⁷. A disclaimer accordingly operates so as not to divest but to prevent it from vesting⁸ and may, therefore, be effected by informal means⁹ as well as by record or deed¹⁰, even if the gift confers a legal estate in property¹¹. Since acceptance of a gift or any part of it is inconsistent with an intention to renounce or disclaim it, it is not permissible to disclaim part only of a single gift¹², and the right to disclaim it is altogether extinguished as soon as any benefit has been received under it¹³.

1 As to what constitutes a disclaimer see *Doe d Wyatt v Stagg* (1839) 5 Bing NC 564; *Doe d Chidgey v Harris* (1847) 16 M & W 517. As to disclaimer of the office and estate of trustee see TRUSTS vol 48 (2007 Reissue) PARA 812 et seq. As to the effect of disclaimer of a particular estate in accelerating subsequent limitations see PARA 472 post; and as to the relevance of disclaimer to a partial intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 618. A disclaimed legacy falls into residue: *Re Backhouse, Westminster Bank Ltd v Shaftesbury Society and Ragged School Union* [1931] WN 168. On the sale of land, if one executor disclaims, the proving executor may act: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 365.

The court may order disclaimer on behalf of a person mentally disordered (see MENTAL HEALTH) or a minor (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 39).

2 *Re Gulbenkian's Settlement Trusts (No 2), Stephens v Mann* [1970] Ch 408, [1969] 2 All ER 1173.

3 *Re Smith, Smith v Smith* [2001] 3 All ER 552, [2001] 1 WLR 1937.

4 *Mallott v Wilson* [1903] 2 Ch 494 at 501. See also *Wilson v Wilson* (1847) 1 De G & Sm 152 (disclaimer did not prejudice charge). The gift formerly attracted estate duty (*Re Parsons, Parsons v A-G* [1943] Ch 12, [1942] 2 All ER 496, CA; *Re Stratton's Deed of Disclaimer, Stratton v IRC* [1958] Ch 42, [1957] 2 All ER 594, CA), but now, if the benefit is disclaimed within two years after the death otherwise than for a consideration of money or money's worth, the gift is not a transfer of value for the purposes of inheritance tax, or a disposal for the purposes of capital gains tax, and in either case the beneficiary is treated as not having become entitled to the interest (see the Inheritance Tax Act 1984 s 142 (as amended); the Taxation of Chargeable Gains Act 1992 s 62(6); and CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 111; INHERITANCE TAXATION vol 24 (Reissue) PARA 471).

5 See *Robson v Flight* (1865) 4 De GJ & Sm 608 at 613; and TRUSTS vol 48 (2007 Reissue) PARA 814.

6 *Re Schär, Midland Bank Executor and Trustee Co v Damer* [1951] Ch 280, [1950] 2 All ER 1069.

7 A person 'cannot have an estate put into him in spite of his teeth': see *Townson v Tickell* (1819) 3 B & Ald 31 at 37 per Abott CJ.

8 A beneficiary who disclaims a gift cannot, therefore, control the subsequent devolution of that gift. As to the effect of disclaimer generally see PARAS 471-475 post.

9 See *Cook v IRC* [2002] STC (SCD) 318 (the evidence from conduct of an intention to disclaim a gift was not strong enough to displace the presumption that the gift would be accepted).

10 A deed is sufficient (*Townson v Tickell* (1819) 3 B & Ald 31; *Begbie v Crook* (1835) 2 Bing NC 70), and is advisable particularly in the case of a trustee (cf *Nicloson v Wordsworth* (1818) 2 Swan 365 at 370; and TRUSTS vol 48 (2007 Reissue) PARA 812). To satisfy the requirements of the Inheritance Tax Act 1984 s 142 (as amended) and the Taxation of Chargeable Gains Act 1992 s 62(6) (see note 4 supra), the disclaimer must be effected by an instrument in writing. As to the irrevocability of deeds see PARA 444 post.

11 *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436 at 439; *Re Clout and Frewer's Contract* [1924] 2 Ch 230. A disclaimer not required to be evidenced by writing is excepted from the requirement that a conveyance (which otherwise includes a disclaimer) of a legal estate must be by deed: see the Law of Property Act 1925 ss 52(1), (2)(b), 205(1)(ii) (s 52 as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 14-15. See also *Townson v Tickell* (1819) 3 B & Ald 31 at 39 per Holroyd J; *Bingham v Lord Clanmorris* (1828) 2 Mol 253; *Stacey v Elph* (1833) 1 My & K 195.

12 *Re Joel, Rogerson v Joel* [1943] Ch 311, [1943] 2 All ER 263, CA; and see PARA 443 post.

13 See eg *Re Wimperis, Wicken v Wilson* [1914] 1 Ch 502; and PARA 444 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(4) ACCEPTANCE AND DISCLAIMER/443. Acceptance and disclaimer of blended gifts.

443. Acceptance and disclaimer of blended gifts.

Where two distinct properties are given to a donee, prima facie he is entitled to take one and disclaim the other¹, even where the two are included under the same words of gift². His right to do so may, however, be rebutted if the intention of the testator is shown that the two gifts should be taken together, or generally that the option to take one and to disclaim the other should not exist³. Where, however, there is a single and undivided gift of an aggregate property, such as a residuary estate, prima facie the donee must either take the whole or nothing⁴. A bequest of a leasehold house 'together with the contents' constitutes a single gift⁵.

1 *Andrew v Trinity Hall, Cambridge* (1804) 9 Ves 525 at 534; *Warren v Rudall, ex p Godfrey* (1860) 1 John & H 1; *Long v Kent* (1865) 11 Jur NS 724; *Aston v Wood* (1874) 43 LJ Ch 715; *Re Loom, Fulford v Reversionary Interest Society* [1910] 2 Ch 230.

2 *Syer v Gladstone* (1885) 30 ChD 614 (discussed and explained in *Frewen v Law Life Assurance Society* [1896] 2 Ch 511 at 516-517). See also *Re Baron Kensington, Earl of Longford v Baron Kensington* [1902] 1 Ch 203 at 210, 211n.

3 *Guthrie v Walrond* (1883) 22 ChD 573 at 577 per Fry J. See also *Moffett v Bates* (1857) 3 Sm & G 468. It appears that it is readily inferred that the donee is not entitled to disclaim where one gift is a leasehold known by the testator to be onerous and bequeathed so as to show that the remainder of the testator's estate was intended to be free from the burden: *Talbot v Earl of Radnor* (1834) 3 My & K 252 (corrected and explained in *Fairtlough v Johnstone* (1865) 16 I Ch R 442). See also *Re Sitwell, Worsley v Sitwell* (1913) 135 LT Jo 323.

4 *A-G v Brackenbury* (1863) 1 H & C 782 at 791; *Green v Britten* (1872) 42 LJ Ch 187; *Hawkins v Hawkins* (1880) 13 ChD 470 at 474, CA; *Guthrie v Walrond* (1883) 22 ChD 573; *Re Hotchkys, Freke v Calmady* (1886) 32 ChD 408 at 417, 419, CA; *Frewen v Law Life Assurance Society* [1896] 2 Ch 511; *Parnell v Boyd* [1896] 2 IR 571 at 602, Ir CA.

5 *Re Joel, Rogerson v Joel* [1943] Ch 311, [1943] 2 All ER 263, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(4) ACCEPTANCE AND DISCLAIMER/444. When a disclaimer or acceptance may be retracted.

444. When a disclaimer or acceptance may be retracted.

A mere refusal by a life tenant to receive income, where there has been no change of position as regards the other persons claiming under the will and the refusal is made without consideration, may be retracted so far as regards future payments of income¹. A life tenant who merely refuses to take possession of a leasehold on account of its burdensome nature is nevertheless entitled to the income of the proceeds of sale². Similarly, if the disclaimer is not of any estate in the property but only of the benefit under the will, accompanied by an assertion of a right by a higher and better title, the person disclaiming is not precluded from acting on his better judgment and taking the property as donee³. In general a disclaimer or renunciation of gifts or benefits under a will may be retracted if no one has altered his position on the faith of it⁴. A disclaimer by deed is, however, probably irrevocable⁵. Once a gift is unequivocally accepted⁶, it cannot as a rule subsequently be repudiated⁷ to the prejudice of others.

1 *Re Young, Fraser v Young* [1913] 1 Ch 272.

2 *Earl of Lonsdale v Countess Berchtoldt* (1857) 3 K & J 185.

3 *Doe d Smyth v Smyth* (1826) 6 B & C 112 at 117.

4 *Re Cranstoun, Gibbs v Home of Rest for Horses* [1949] Ch 523, [1949] 1 All ER 871. Cf *Shep Touch* (8th Edn) 69-70. See, however, *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632, [1968] 1 WLR 1125 at 1143, CA.

5 A deed is ordinarily irrevocable unless a power of revocation is expressly reserved: see *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223 at 232-233, [1964] 3 All ER 82 at 86-87; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 67 et seq. See, however, *Re Smith, Smith v Smith* [2001] 3 All ER 552, [2001] 1 WLR 1937 (although in this case the disclaimer was held to be ineffective rather than revoked).

6 *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 523-524 (acceptance held equivocal on subsequent disclaimer); *Re Wimperis, Wicken v Wilson* [1914] 1 Ch 502 (mere negotiations).

7 *A-G v Christ's Hospital* (1830) 1 Russ & M 626 (attempted disclaimer by charity); *A-G v Munby* (1858) 3 H & N 826 at 831 (attempted disclaimer by executors of legatee who had accepted); *Bence v Gilpin* (1868) LR 3 Exch 76; *Parnell v Boyd* [1896] 2 IR 571 at 589, 596, Ir CA. Cf *Re Shepherd, Harris v Shepherd* [1943] Ch 8, [1942] 2 All ER 584.

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(5) ADEMPTION

445. Methods of ademption.

A testamentary gift may be adeemed or taken away from the donee:

- 34 (1) by a subsequent disposition by the testator of the subject matter of the gift;
- 35 (2) by a change in the ownership or nature of the property; and
- 36 (3) by the presumption that the testator does not intend to provide double portions for his children or other persons to whom he stands in loco parentis¹.

If, however, in a will there are gifts of two properties settled in trust, one by reference to the trusts of the other (as, for example, where heirlooms are settled to follow the trusts of realty), the subsequent alteration of the trusts of one property by a deed executed by the testator in his lifetime does not affect earlier testamentary limitations relating to the other property². Apart from the presumption as to double portions, there can be no ademption of a residuary gift³.

1 See EQUITY vol 16(2) (Reissue) PARA 739 et seq. See also *Re Vaux, Nicholson v Vaux* [1939] Ch 465, [1938] 4 All ER 703, CA; *Re Cameron, Philips v Cameron* [1999] Ch 386, [1999] 2 All ER 924 (presumption against double portions applied); *Casimir v Alexander* [2001] WTLR 939 (presumption rebutted on the evidence); *Race v Race* [2002] WTLR 1193 (presumption held to apply in relation to an interest in land). As to the effect of change of ownership of property see PARA 446 post. As to the admissibility of evidence rebutting or supporting the presumption see PARA 485 post. See also *Re Malcolm, Marjoribanks v Malcolm* (1923) 156 LT Jo 361; and EQUITY vol 16(2) (Reissue) PARA 750.

2 *Re Whitburn, Whitburn v Christie* [1923] 1 Ch 332.

3 *Re Walker, Goodwin v Scott* [1921] 2 Ch 63.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(5) ADEMPMENT/446. Change in ownership or form of property.

446. Change in ownership or form of property.

A specific gift¹ may be adeemed by its subject matter ceasing to be part of the testator's estate or ceasing to be subject to his right of disposition². If a specific gift is adeemed, a charge on it is also adeemed³. Where the testator devises a house which he has contracted to purchase and the vendor repudiates the contract before the testator's death, the devisee is not entitled to the purchase money, notwithstanding a direction that it is to be paid out of the personal estate⁴. A devise of a rentcharge is adeemed if the rentcharge is subsequently merged on the purchase by the testator of the property out of which it issues⁵. The gift may be adeemed by the testator's own disposition of it, for example by sale or change of investment⁶. After a sale of specifically devised property the money produced by the sale, if not otherwise disposed of by the will, passes as part of the general personal estate⁷, and, if the sale is not completed until after the testator's death, the donee takes the intermediate rents until completion to which the testator is entitled⁸. A specific gift of chattels in a certain locality is as a rule adeemed by their permanent removal to another locality⁹.

Various subsequent events which result in the property ceasing to conform to the description by which it is given cause ademption¹⁰. Even where the change is effected by Act of Parliament, ademption follows¹¹ unless the Act contains a provision which prevents ademption¹², or the change is a change in name or form only, and the property exists as substantially the same thing although in a different shape¹³. Whether the property exists as substantially the same thing at the death of the testator is a question of fact¹⁴.

Where a gift has been adeemed, it will not be set up again by a codicil confirming the will¹⁵, at least where the ademption has been effected by a subsequent gift. In the case of ademption effected by a change in the nature of the property by operation of law, a codicil may prevent ademption¹⁶.

1 As to general, specific and demonstrative legacies see *Re Borrer's Trusts*, *Dunlop v Borrer* (1909) 54 Sol Jo 32; *Re Rose*, *Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78, [1948] 2 All ER 971 (gifts adeemed). See also *Bronsdon v Winter* (1738) Amb 57; *Hayes v Hayes* (1836) 1 Keen 97 (life interest adeemed in part; interest in remainder not adeemed); *Robinson v Addison* (1840) 2 Beav 515; *Re Willcocks*, *Warwick v Willcocks* [1921] 2 Ch 327 (no ademption); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 472 et seq. For an example of the subsequent payment off of government stock which had been left as a general legacy see *Re Gage*, *Crozier v Gutheridge* [1934] Ch 536; and as to a general legacy of stock compulsorily acquired by the Treasury before the testator's death see *Re Borne*, *Bailey v Bailey* [1944] Ch 190, [1944] 1 All ER 382.

2 As to the application of the doctrine of ademption to general and special powers of appointment see POWERS vol 36(2) (Reissue) PARA 307.

3 *Cowper v Mantell* (1856) 22 Beav 223. A devise of a house does not carry a mortgage on the house taken by the testator on sale (*Re Clowes* [1893] 1 Ch 214, CA; *Re Richards*, *Jones v Rebbeck* [1921] 1 Ch 513), or purchase money deposited with trustees (*Gilfoyle v Wood-Martin* [1921] 1 IR 105). Cf *Re Carter*, *Dodds v Pearson* [1900] 1 Ch 801 (where the testator was a mortgagee in possession).

4 *Re Rix*, *Steward v Lonsdale* (1921) 90 LJ Ch 474.

5 *Re Bick*, *Edwards v Bush* [1920] 1 Ch 488.

6 *Humphreys v Humphreys* (1789) 2 Cox Eq Cas 184 (sale); *Moor v Raisbeck* (1841) 12 Sim 123; *Farrar v Earl Winterton* (1842) 5 Beav 1 (sale); *Lee v Lee* (1858) 27 LJ Ch 824 (sale); *Harrison v Jackson* (1887) 7 ChD 339; *Macdonald v Irvine* (1878) 8 ChD 101, CA (change of investment); *Re Lane*, *Luard v Lane* (1880) 14 ChD 856 (debentures converted into debenture stock; and see the observations of Joyce J in *Re Herring*, *Murray v Herring* [1908] 2 Ch 493 at 499); *Re Clowes* [1893] 1 Ch 214, CA (property sold by and afterwards mortgaged to testator); *Re Edwards*, *Macadam v Wright* [1958] Ch 168, [1957] 2 All ER 495 (agreement for valuable

consideration to devise to another); *Banks v National Westminster Bank plc* [2005] All ER (D) 159 (Apr) (property sold by testatrix's attorney prior to her death). A contract for sale by a testator which is unenforceable or rescinded by the purchaser does not cause ademption (*Re Pearce, Roberts v Stephens* (1894) 8 R 805; and see *Re Thomas, Thomas v Howell* (1886) 34 ChD 166), nor does a mere request by the testator to his agents to sell (*Harrison v Asher* (1848) 2 De G & Sm 436).

7 *Moor v Raisbeck* (1841) 12 Sim 123 at 139.

8 *Watts v Watts* (1873) LR 17 Eq 217 at 221.

9 See the cases cited in PARA 576 notes 2, 9 post.

10 Eg loss or destruction (*Durrant v Friend* (1852) 5 De G & Sm 343 (specific legatee of chattels lost had no right to insurance money); *Trustees, Executors and Agency Co Ltd v Scott* (1898) 24 VLR 522 (fire)); and compulsory purchase or notice to treat, even though the purchase is completed after death (*Ex p Hawkins* (1843) 13 Sim 569; *Re Manchester and Southport Rly Co* (1854) 19 Beav 365; *Re Bagot's Settlement* (1862) 31 LJ Ch 772 (where the purchase money was liable to be reinvested in land); *Watts v Watts* (1873) LR 17 Eq 217; *Manton v Tabois* (1885) 30 ChD 92; *Re Viscount Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419). No ademption is, as a rule, caused by the transfer of the specifically bequeathed property by trustees into the testator's own name unless described by reference to the trustees' ownership (*Dingwell v Askew* (1788) 1 Cox Eq Cas 427; *Lee v Lee* (1858) 27 LJ Ch 824; *Re Vickers, Vickers v Mellor* (1899) 81 LT 719 (bequest of trust fund afterwards transferred to testator's banking account); *Toole v Hamilton* [1901] 1 IR 383 (bequest of money receivable under will, subsequently paid to testator's banking account); and see *Clough v Clough* (1834) 3 My & K 296; *Jones v Southall (No 2)* (1862) 32 Beav 31; and cf *Ogilvie-Forbes' Trustees v Ogilvie-Forbes* 1955 SC 405 (where a bequest of the life rent of heritable property was adeemed by transfer to a limited company in which the testator remained the controlling shareholder)); or by the unauthorised acts of third persons without the testator's knowledge (*Earl of Shaftesbury v Countess of Shaftesbury* (1716) 2 Vern 747; *Basan v Brandon* (1836) 8 Sim 171 (investment subsequently ratified by testator); *Jenkins v Jones* (1866) LR 2 Eq 323); nor can the value of the specifically bequeathed property be increased by such unauthorised acts, as eg where an agent without authority discharges a liability affecting the property (*Re Larking, Larking v Larking* (1887) 37 ChD 310). Where property of a person mentally disordered is sold under the Mental Health Act 1983, a person who would on the patient's death have taken an interest in the property sold takes a like interest, if and in so far as circumstances allow, in the proceeds of sale: see s 101(1)-(3); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 688-689, 746.

11 *Frewen v Frewen* (1875) 10 Ch App 610 (advowson affected by Irish Church Act 1869); *Re Slater, Slater v Slater* [1907] 1 Ch 665, CA (water company affected by the Metropolis Water Act 1902). Where by a will made before 1 January 1926 an undivided share of real estate had been devised, and the testator died on or after that date, the conversion of the share into personal estate by the Law of Property Act 1925 ss 34(3), 35 (see *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA) would cause ademption: *Re Newman, Slater v Newman* [1930] 2 Ch 409. Since 1 January 1997 all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share now has an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66. Where trusts for sale are imposed expressly by the trust instrument, then, unless the trust was created by the will of a testator who died before 1 January 1997, the existence of the duty to sell no longer means that the land is to be regarded as personal property: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq. It is possible that in a will made before 1 January 1997 of a testator dying on or after that date a gift of a share of land which is expressed to be a gift of personalty or a gift of a share of the proceeds of sale might, by a reverse application of *Re Newman, Slater v Newman* supra, be adeemed: see further PARAS 579, 582 post.

12 *Re Jenkins, Jenkins v Davies* [1931] 2 Ch 218, CA (reference in any will etc to old stock to be deemed reference to substituted stock). See also *Re Anderson, Public Trustee v Bielby* (1928) 44 TLR 295; *Re Viscount Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419 (vesting of coal and coal mines under the Coal Act 1938).

13 *Oakes v Oakes* (1852) 9 Hare 666 at 672; approved in *Re Slater, Slater v Slater* [1907] 1 Ch 665 at 672, CA. See also *Partridge v Partridge* (1736) Cas temp Talb 226; *Humphreys v Humphreys* (1789) 2 Cox Eq Cas 184 at 185; *Re Pilkington's Trusts* (1865) 6 New Rep 246.

14 In the following cases the subject matter in its altered form passed under the gift: *Backwell v Child* (1755) Amb 260 (share of profits of partnership; articles renewed and altered); *Collison v Curling* (1842) 9 Cl & Fin 88, HL (consols sold and invested on stock mortgage); *Re Clifford, Mallam v McFie* [1912] 1 Ch 29 (shares subdivided); *Re Greenberry, Hops v Daniell* (1911) 55 Sol Jo 633 (shares subdivided); *Re Faris, Goddard v*

Overend [1911] 1 IR 165 (conversion into stock); *Re Leeming, Turner v Leeming* [1912] 1 Ch 828 (reconstruction of company under substantially the same constitution with diminished capital); *Re Humphreys, Wren v Ward* (1915) 60 Sol Jo 105 (shares and stock, but not debentures, in a reconstructed company issued in lieu of shares); *Re Kuypers, Kuypers v Kuypers* [1925] Ch 244 (preference shares with reduced rights issued on a reorganisation of capital in lieu of preference shares, but not new preference shares issued as compensation for the reduction of rights); *Re O'Brien, Little v O'Brien* (1946) 175 LT 406 (shares after subdivision, but not bonus shares; not following *Re Faris, Goddard v Overend* supra as regards bonus shares; and see *Re Tetsall, Foyster v Tetsall* [1961] 2 All ER 801, [1961] 1 WLR 938); *Re Lewis's Will Trusts, Lewis v Williams* [1984] 3 All ER 930, [1985] 1 WLR 102 (where it was held, applying *Re Tetsall, Foyster v Tetsall* supra, that a specific gift of 'my freehold farm' was not effective to carry the testator's holding of three-quarters of the issued shares in a farming company which owned a farm and other assets). See also *Re Dorman* [1994] 1 All ER 804, [1994] 1 WLR 282 (gift of credit balance in specifically identified bank deposit account; money transferred during lifetime of testatrix to new account at same bank yielding higher rate of interest and requiring 30 days' notice of withdrawal but otherwise on same terms; gift held on the facts to amount to gift of a fund and the transfer of the money did not adeem the gift). Treasury rules may prevent ademption on an exchange of one government security for another: *Re Macartney, Brookhouse v Barman* (1920) 36 TLR 394.

15 *Powys v Mansfield* (1837) 3 My & Cr 359; *Re Aynsley, Kyrle v Turner* [1914] 2 Ch 422 (on appeal [1915] 1 Ch 172, CA); *Re Viscount Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419. Where the ademption is doubtful, the confirmation of the will is important: *Re Aynsley, Kyrle v Turner* supra at 429.

16 See *Re Warren, Warren v Warren* [1932] 1 Ch 42. The devise by a will made before 1 January 1926 of a testator dying on or after that date of an undivided share of real estate, which would otherwise have been adeemed by the imposition of the statutory trust for sale and the resultant conversion of the share into personal estate (see *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Newman, Slater v Newman* [1930] 2 Ch 409; and note 11 supra), but which could be construed as passing all the testator's interest in property was saved by a codicil made after 31 December 1925 confirming the will (*Re Wheeler, Jameson v Cotter* [1928] WN 225; *Re Warren, Warren v Warren* supra; *Re Harvey, Public Trustee v Hosken* [1947] Ch 285, [1947] 1 All ER 349 (where there was no express confirmation of the will)).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(5) ADEPTION/447. Effect of sale or exercise of option.

447. Effect of sale or exercise of option.

A specific devise of real property will be adeemed if the testator subsequently sells it¹. Such a gift will also be adeemed where the testator enters into a specifically enforceable contract to sell it². Anomalously, the doctrine has been extended to specifically devised property over which the testator grants an option to purchase after the date of the will which is not exercised until after his death³. There will, however, be no ademption in such a case if the context of the will or the circumstances of the case show that the testator had the option present to his mind at the date of the will⁴, or otherwise that the donee was intended to take the whole interest of the testator⁵. The exercise of an option which is created before the date of the will does not, however, adeem the gift⁶, as the property in the state in which it is given is subject to the option and the donee is, therefore, entitled to the purchase money payable on the exercise of the option⁷.

1 *Arnald v Arnald* (1784) 1 Bro CC 401; *Whiteway v Fisher* (1861) 9 WR 433; *Manton v Tabois* (1885) 30 ChD 92. The doctrine is unaffected by the Trusts of Land and Appointment of Trustees Act 1996 s 3, which abolished conversion in relation to property held on an express trust for sale: see REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq. In *Davenport v National Westminster Bank plc* (unreported, 14 April 2005, Ch D), it was held that a specific devise of property which was subsequently sold by the testator's attorney under an enduring power was adeemed (not following *Re Viertel* [1996] QSC 66, [2003] WTLR 1075, Qld SC, in which it was held on similar facts that the gift was not adeemed on the grounds that the testator had had no notice of the sale).

2 *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627 at 632, [1952] 1 All ER 853 at 856. For this purpose, an enforceable right conferred by statute to acquire property will adeem a specific gift of that property: *Re Galway's Will Trusts, Lowther v Viscount Galway* [1950] Ch 1, [1949] 2 All ER 419 (vesting of coal

and coal mines under the Coal Act 1938). A notice to treat under the Compulsory Purchase Act 1965 will not of itself adeem a specific gift of property as it does not create a contract of which the court would decree specific performance (*Haynes v Haynes* (1861) 1 Drew & Sm 426 (notice to treat under the Lands Clauses Consolidation Act 1845)); aliter if the price has been fixed, whether by agreement, arbitration or otherwise, for then there is an enforceable agreement (*Harding v Metropolitan Rly Co* (1872) 7 Ch App 154).

3 *Lawes v Bennett* (1785) 1 Cox Eq Cas 167; *Weeding v Weeding* (1861) 1 John & H 424; *Re Carrington, Ralphs v Swithenbank* [1932] 1 Ch 1, CA (where *Lawes v Bennett* supra and *Weeding v Weeding* supra were said to have been acted on too long for the court to overrule them); *Re Rose, Midland Bank Executor and Trustee Co v Rose* [1949] Ch 78, [1948] 2 All ER 971. See also *Re Isaacs, Isaacs v Reginall* [1894] 3 Ch 506 (which applies the doctrine to intestacy). Notice to exercise the option effects a conversion, even if not followed up by completion: *Re Blake, Gawthorne v Blake* [1917] 1 Ch 18. However, the determination, after the testator's death, of a lease containing a provision for determination on payment of compensation does not deprive the specific legatee of the right to the compensation: *Coyne v Coyne* (1876) IR 10 Eq 496.

The rule applies also to a conditional contract for the sale of specifically devised property where the contract becomes unconditional after the testator's death: *Re Sweeting, Sweeting v Sweeting* [1988] 1 All ER 1016. But the rule does not apply where property specifically given is subject to a right of pre-emption which is not exercised until after the death: *Pennington v Waine* [2003] WTLR 1011.

4 *Re Pyle, Pyle v Pyle* [1895] 1 Ch 724 at 729.

5 See *Re Calow, Calow v Calow* [1928] Ch 710 (contract). See also *Re Isaacs, Isaacs v Reginall* [1894] 3 Ch 506 at 510, explaining *Emuss v Smith* (1848) 2 De G & Sm 722 (option to be exercisable only after death).

6 Where the question is whether property passes under a general gift of realty or a general gift of personalty, the exercise of an option over land which was granted before the will was made will cause the property to devolve as personalty: *Lawes v Bennett* (1785) 1 Cox Eq Cas 167.

7 *Drant v Vause* (1842) 1 Y & C Ch Cas 580; *Emuss v Smith* (1848) 2 De G & Sm 722 (codicil after date of contract); *Re Pyle, Pyle v Pyle* [1895] 1 Ch 724. As to the creation of options to purchase by will see PARA 416 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(5) ADEMPION/448. Change of investment contemplated.

448. Change of investment contemplated.

Where the nature of the property has changed, the first consideration, in deciding whether a gift is adeemed, must always be the words used by the testator in describing or dealing with the property bequeathed¹. From the words of the particular will, construed according to the usual rules in cases of description², the court may find that the testator contemplated a change of investment³, and that the thing bequeathed is the property which for the time being represents the property which the testator formerly had⁴. In such a case the gift is not dependent on the specific investments representing the gift at the date of the will, but includes reinvestments into which they can be traced⁵.

1 *Re Bridle* (1879) 4 CPD 336 at 341 per Lindley J; *Re Slater, Slater v Slater* [1906] 2 Ch 480 at 484 per Joyce J.

2 See PARA 573 post.

3 *Sidebotham v Watson* (1853) 11 Hare 170 at 174. See also *Earl of Thomond v Earl of Suffolk* (1718) 1 P Wms 461.

4 See *Re Moses, Beddington v Beddington* [1902] 1 Ch 100 at 120, CA; affd sub nom *Beddington v Baumann* [1903] AC 13 at 15, HL, per Earl of Halsbury, LC. See also *Bronsdon v Winter* (1738) Amb 57. A bequest of specified securities or investments representing the same will pass money on deposit representing the securities: *Re Lewis's Will Trusts, O'Sullivan v Robbins* [1937] Ch 118, [1937] 1 All ER 227. See also *Re Bancroft, Bancroft v Bancroft* [1928] Ch 577 (where a bequest of 'all my rights' in a play carried the purchase money under a contract by the testator to sell the play and the contract was not completed until after his death).

5 *Le Grice v Finch* (1817) 3 Mer 50; *Clark v Browne* (1854) 2 Sm & G 524 (these cases were, however, doubted, on the question of construction involved, in *Harrison v Jackson* (1877) 7 ChD 339 at 342-343 per Jessel MR); *Lee v Lee* (1858) 27 LJ Ch 824; *Moore v Moore* (1860) 29 Beav 496; *Morgan v Thomas* (1877) 6 ChD 176 (followed in *Re Kenyon's Estate*, *Mann v Knapp* (1887) 56 LT 626); *Re Johnstone's Settlement* (1880) 14 ChD 162; *Willett v Finlay* (1892) 29 LR Ir 156 (affd 29 LR Ir 497, Ir CA), explained, as decided on the ground stated in the text to note 4 supra, in *Re Moses*, *Beddington v Beddington* [1902] 1 Ch 100 at 121, CA (on appeal sub nom *Beddington v Baumann* [1903] AC 13, HL). For this purpose, money on deposit may be an investment: *Re Lewis's Will Trusts*, *O'Sullivan v Robbins* [1937] Ch 118, [1937] 1 All ER 227; cf *Re Dorman* [1994] 1 All ER 804, [1994] 1 WLR 282 (cited in PARA 446 note 14 ante).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(5) ADEMPION/449. Payment of debt.

449. Payment of debt.

A bequest of a debt is adeemed by the whole debt being paid to the testator in his lifetime, whether the payment is compulsory or voluntary, and whether the sum is expressed in the bequest or the debt is bequeathed generally¹. The bequest is adeemed pro tanto if the testator receives payment of part of the debt².

1 *Earl of Thomond v Earl of Suffolk* (1718) 1 P Wms 461; *Rider v Wager* (1752) 2 P Wms 329; *A-G v Parkin* (1769) Amb 566; *Stanley v Potter* (1789) 2 Cox Eq Cas 180; *Badrick v Stevens* (1792) 3 Bro CC 431; *Fryer v Morris* (1804) 9 Ves 360; *Barker v Rayner* (1826) 2 Russ 122; *Gardner v Hatton* (1833) 6 Sim 93; *Sidney v Sidney* (1873) LR 17 Eq 65; *Re Bridle* (1879) 4 CPD 336.

2 *Ashburner v Macquire* (1786) 2 Bro CC 108 (bankruptcy dividends).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(i) In general/450. Meaning of 'lapse'.

(6) LAPSE

(i) In general

450. Meaning of 'lapse'.

The term 'lapse' is applied to the failure of a testamentary gift owing to the death of the devisee or legatee in the testator's lifetime¹, whether before or after the date of the will², but the testator may indicate in his will that he is using the word in a wider sense³. As a rule⁴ a devisee or legatee must survive the testator⁵ in order that he or his estate may have the benefit of the gift⁶, and a confirmation by codicil of a gift in a will to a legatee who has died since the date of the will does not prevent a lapse⁷.

1 *Elliott v Davenport* (1705) 1 P Wms 83.

2 *Maybank v Brooks* (1780) 1 Bro CC 84 (where it was held that extrinsic evidence was inadmissible to prove that the testator knew at the date of his will that the legatee was dead); *Clarke v Clemmans*, *Selway v Clemmans* (1866) 36 LJ Ch 171. A provision in a will against lapse of legacies given by 'this my will' extends to legacies given by a codicil: *Re Smith*, *Prada v Vandroy* [1916] 2 Ch 368, CA. In relation to testators dying on or after 1 January 1983 and before 1 January 1996 there was also a statutory lapse of a gift to a spouse if there had been dissolution or annulment of the marriage under the Wills Act 1837 s 18A (as added) but it did not mean the same as lapse in its ordinary meaning: see *Re Sinclair*, *Lloyds Bank plc v Imperial Cancer Research*

Fund [1985] Ch 446, [1985] 1 All ER 1066, CA; and PARA 468 post. As to the position relating to deaths on or after 1 January 1996 see PARA 469 post; and as to the position relating to the dissolution or annulment of civil partnerships see PARA 470 post. As to the consequences of lapse and other types of failure of gifts see PARA 471 et seq post.

3 See *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664, CA.

4 For exceptions see PARA 453 et seq post.

5 As to the burden of proof of survivorship see PARA 335 ante.

6 5 Bac Abr, Legacies and Devises (L) 4, Legacies (E); *Elliott v Davenport* (1705) 1 P Wms 83. The rule applies to a devise by A on the trusts of the will of a deceased person, and the devise fails as regards devisees who predecease A: *Culsha v Cheese* (1849) 7 Hare 236 at 245. See also *Re Currie's Settlement, Re Rooper, Rooper v Williams* [1910] 1 Ch 329; but cf *Re Playfair, Palmer v Playfair* [1951] Ch 4, [1950] 2 All ER 285.

7 *Hutcheson v Hammond* (1790) 3 Bro CC 128. See also *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(i) In general/451. Application of the doctrine to powers.

451. Application of the doctrine to powers.

The doctrine of lapse applies to powers created by will, and a power of appointment¹ or of charging settled estates² fails if the testator survives the donee of the power, but the death of the donee of a power prior to the testator does not cause the interests of persons taking in default of appointment to lapse³.

A power to appoint by will to an individual cannot be exercised in favour of his executors if the individual dies before the donee of the power⁴, and, therefore, any appointment to the individual lapses if he predeceases the donee⁵. Where, however, a power of appointment among a class or among named individuals is given by will, and all the objects survive the testator, but one or more die in the lifetime of the donee of the power, the power may be exercised in favour of the survivors⁶.

1 *Jones v Southall (No 2)* (1862) 32 Beav 31; *Sharpe v M'Call* [1903] 1 IR 179. See also *Re Baker, Steadman v Dicksee* [1934] WN 94, CA.

2 *Griggs v Gibson, Maynard v Gibson (No 2)* (1866) 35 LJ Ch 458. As to the lapse of powers see further POWERS vol 36(2) (Reissue) PARAS 301-303, 306.

3 *Nichols v Haviland* (1855) 1 K & J 504. See also *Hardwick v Thurston* (1828) 4 Russ 380; *Edwards v Saloway* (1848) 2 Ph 625; *Kellett v Kellett* (1871) IR 5 Eq 298. As to appointment by a donee who outlives the power see POWERS vol 36(2) (Reissue) PARA 337.

4 *Re Susanni's Trusts* (1877) 47 LJ Ch 65. An appointment under a general power may be saved from lapse by a substitutional appointment to the executors or administrators of the object of the power: see POWERS vol 36(2) (Reissue) PARA 301.

5 *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61; *Freeland v Pearson* (1867) LR 3 Eq 658 (following *Reid v Reid* (1858) 25 Beav 469; *Kennedy v Kingston* (1821) 2 Jac & W 431). See also *Re Brookman's Trust* (1869) 5 Ch App 182 (where there was a covenant in a marriage settlement to appoint by will, and the object of the power died in the lifetime of the covenantor); *Muir (or Williams) v Muir* [1943] AC 468 at 485, HL, per Lord Romer. As to surviving objects taking by implication, where no appointment is made and there is no gift over see POWERS vol 36(2) (Reissue) PARAS 209-211.

6 See POWERS vol 36(2) (Reissue) PARA 279.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(i) In general/452. Lapse of charitable legacies.

452. Lapse of charitable legacies.

Legacies to charitable institutions¹ ceasing to exist in the testator's lifetime lapse² or are applicable cy-près³, depending on whether the gift is construed to be for the benefit of the particular institution or to import a general charitable intention⁴.

1 As to gifts to non-charitable societies see PARA 338 ante.

2 See CHARITIES vol 8 (2010) PARA 146 et seq.

3 See CHARITIES vol 8 (2010) PARA 208 et seq.

4 As to the existence of a general charitable intention see CHARITIES vol 8 (2010) PARA 166 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/453. Gifts in pursuance of moral obligation.

(ii) Exceptions from Lapse

453. Gifts in pursuance of moral obligation.

The doctrine of lapse does not apply, even though the legatee predeceases the testator, where the legacy is given with the intention of discharging a moral obligation¹, whether legally binding or not, which is recognised by the testator and is existing at his death². The doctrine applies, however, to a settlement by will made in pursuance of a covenant in marriage articles³. A bequest of a debt to the debtor or to him, his executors and administrators, coupled with a direction to hand over securities, lapses like an ordinary legacy⁴.

1 Eg a statute-barred debt (*Williamson v Naylor* (1838) 3 Y & C Ex 208; *Philips v Philips* (1844) 3 Hare 281 at 290), or a debt barred by a discharge in bankruptcy (*Re Sowerby's Trusts* (1856) 2 K & J 630; *Turner v Martin* (1857) 7 De GM & G 429). See, however, *Coppin v Coppin* (1725) 2 P Wms 291 at 296 (where legacies to creditors of the amounts of debts which had been released were treated as voluntary gifts).

2 *Stevens v King* [1904] 2 Ch 30; *Re Leach, Chatterton v Leach* [1948] Ch 232, [1948] 1 All ER 383 (legacy by testatrix to her deceased son's creditor).

3 *Re Brookman's Trust* (1869) 5 Ch App 182.

4 *Elliott v Davenport* (1705) 1 P Wms 83; *Toplis v Baker* (1787) 2 Cox Eq Cas 118; *Maitland v Adair* (1796) 3 Ves 231; *Izon v Butler* (1815) 2 Price 34. See also *South v Williams* (1842) 12 Sim 566 (where the will was held to express an intention that the legacy should not lapse).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/454. Alternative gifts.

454. Alternative gifts.

Where it is clear that, in the event of the legatee or devisee predeceasing the testator, an alternative bequest is intended to be substituted¹, the alternative gift takes effect

notwithstanding the death of the original legatee in the testator's lifetime. Thus a gift to a person or his heirs has been treated as an alternative bequest under which the next of kin surviving the testator might take². If, however, the intention is merely to signify that the legatee is to take a vested and transmissible interest, the legacy lapses in the ordinary way³, and the mere addition to the name of the devisee⁴ or legatee⁵ of words of limitation such as 'and his executors', or formerly 'and his heirs', or the like, or a declaration that a devise or legacy is not to lapse, if unaccompanied by a gift by way of substitution⁶, or a declaration that a gift is to vest as from the date of the will, even though words of limitation are added to the name of the legatee or devisee⁷, does not prevent a lapse. A declaration that, if any of certain named legatees die in the lifetime of the testator leaving issue living at his death, the benefits given to the legatees so dying are not to lapse, but are to take effect as if those legatees had died immediately after the testator, prevents a lapse, and the benefits of those legatees pass to their respective legal personal representatives as part of their estates⁸.

1 As to alternative gifts generally see PARA 612 et seq post.

2 *Re Porter's Trust* (1857) 4 K & J 188 at 193.

3 *Re Porter's Trust* (1857) 4 K & J 188 at 193; *Corbyn v French* (1799) 4 Ves 418.

4 *Hutton v Simpson* (1716) 2 Vern 722; *Goodright v Wright* (1717) 1 P Wms 397. As to words of limitation being unnecessary in a will to pass an estate of inheritance in realty see PARA 660 post.

5 *Elliott v Davenport* (1705) 1 P Wms 83; *Stone v Evans* (1740) 2 Atk 86; *Maybank v Brooks* (1780) 1 Bro CC 84; *Re Currie's Settlement*, *Re Rooper*, *Rooper v Williams* [1910] 1 Ch 329 at 333-334.

6 *Sibley v Cook* (1747) 3 Atk 572. See also *Underwood v Wing* (1855) 4 De GM & G 633.

7 *Browne v Hope* (1872) LR 14 Eq 343.

8 *Re Greenwood*, *Greenwood v Sutcliffe* [1912] 1 Ch 392 (following *Re Clunies-Ross*, *Stubbings v Clunies-Ross* (1912) 106 LT 96; and distinguishing *Re Gresley's Settlement*, *Willoughby v Drummond* [1911] 1 Ch 358 and *Re Scott* [1901] 1 KB 228, CA). An appointment by a testatrix in favour of her husband, where she directs that the will is to take effect whether she survives or predeceases him, does not, if he predeceases her, operate in favour of his estate, and there is a lapse: *Re Ladd*, *Henderson v Porter* [1932] 2 Ch 219.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/455. Legacy to executors of deceased legatee.

455. Legacy to executors of deceased legatee.

A legacy may be given to the executors or administrators of a deceased person as an original gift¹, or to the executors or administrators of the legatee as a substitutional gift in case he predeceases the testator². Such a substitutional gift prevents a lapse by the death of the legatee in the lifetime of the testator, and, although the gift does not actually become part of the legatee's estate³, it is held by his personal representatives in trust to administer it as if it were part of his estate⁴. Moreover, while the gift does not lapse by the death before the testator of the persons who were the executors or administrators at the date of the will, it lapses by the death before the testator of the beneficiary who would take it under the legatee's will or on his intestacy⁵, including a personal representative who is himself sole beneficiary⁶. A gift to a person or his executors or administrators to take effect, not on the testator's death, but at a future date, fails if the donee dies before the testator⁷.

1 *Trethewy v Helyar* (1876) 4 ChD 53. See also *Re Newton's Trusts* (1867) LR 4 Eq 171 (where a gift of personal estate to the heirs and assigns of a deceased person was treated as a gift to her statutory next of kin).

2 In the following cases lapse was prevented: *Sibley v Cook* (1747) 3 Atk 572 (bequest to A and his executors or administrators with declaration against lapse); *Long v Watkinson* (1852) 17 Beav 471 (to A 'and in case of his death to his executors or administrators'); *Hewitson v Todhunter* (1852) 22 LJ Ch 76 (declaration that, if the legatee died in the testator's lifetime, the legacy should not lapse, but should go to his personal representatives); *Re Wilder's Trusts* (1859) 27 Beav 418 (express words of substitution); *Lord Advocate v Bogie* [1894] AC 83, HL (executors and representatives); *Re Bosanquet, Unwin v Petre* (1915) 85 LJ Ch 14 (personal representative or representatives); *Re Cousen's Will Trusts, Wright v Killick* [1937] Ch 381, [1937] 2 All ER 276 ('interest for his or her personal representatives as part of his or her estate'); *Re Wray, Wray v Wray* [1951] Ch 425, [1951] 1 All ER 375, CA ('be transferred and paid to his personal representatives and form part of his estate and be treated as directed by his will'). See also *Bridge v Abbot* (1791) 3 Bro CC 224 (legal representatives); *Hinchliffe v Westwood* (1848) 2 De G & Sm 216 (reversionary bequest to sons, and, in case of the death of any of them in the lifetime of the tenant for life, to their legal personal representatives); *Re Green's Estate* (1860) 1 Drew & Sm 68 (if no claim by legatee within three years after testator's death, gift to his sister and brother; no lapse by death of legatee in lifetime of testator); *Maxwell v Maxwell* (1868) IR 2 Eq 478 (to younger sons or their executors); *Aspinall v Duckworth* (1866) 35 Beav 307 (declaration against lapse with gift to legatee's executors as part of his personal estate); *Re Smith, Prada v Vandroy* [1916] 2 Ch 368, CA (substituted gift to legal personal representatives of legatees; legacies given by 'this my will' held to include those given by codicil).

In the following cases there was a lapse, the gift being held to fail on the ground that the expression used did not show an intention to substitute an alternative gift on failure of the primary one: *Bone v Cook* (1824) M'Cle 168 (where a distinction was drawn between a gift to children and a gift to executors or administrators in the event of the death of the legatee); *Smith v Oliver* (1848) 11 Beav 494 (gift to legatee, and, in case of his death, 'not having received his legacy', to his children); *Leach v Leach* (1866) 35 Beav 185 (gifts to remaindermen after life interest; shares of two who died in testator's lifetime lapsed); *Re Masterson, Trevanion v Dumas* [1902] WN 192, CA (gift to remaindermen and their 'heirs and assigns' failed on remaindermen all predeceasing testatrix). For the general rule that a gift to the executors of a deceased person is taken by them as part of the deceased's estate see PARA 648 post.

3 This appears to be so notwithstanding that the gift is to the executors or administrators as part of his estate: see *Re Seymour's Trusts* (1859) John 472; *Re Bosanquet, Unwin v Petre* (1915) 85 LJ Ch 14; *Re Cousen's Will Trusts, Wright v Killick* [1937] Ch 381, [1937] 2 All ER 276.

4 *Lord Advocate v Bogie* [1894] AC 83, HL; *Re Cousen's Will Trusts, Wright v Killick* [1937] Ch 381, [1937] 2 All ER 276.

5 *Re Bosanquet, Unwin v Petre* (1915) 85 LJ Ch 14.

6 *Re Cousen's Will Trusts, Wright v Killick* [1937] Ch 381, [1937] 2 All ER 276. See also *Re Wray, Wray v Wray* [1951] Ch 425, [1951] 1 All ER 375, CA.

7 *Tidwell v Ariel* (1818) 3 Madd 403 (legacy to be paid one year after testator's death; 'heir' construed as meaning personal representative). Cf *Re Porter's Trust* (1857) 4 K & J 188 (where *Tidwell v Ariel* supra was explained).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/456. Interests in tail; testator dying before 1997.

456. Interests in tail; testator dying before 1997.

Where a testator who died before 1 January 1997 gave an entailed interest or an interest in quasi-entail¹ in property, whether real or personal², to a beneficiary who predeceased him leaving issue capable of inheriting under the entail, the gift did not lapse but took effect as if the death of the beneficiary had occurred immediately after the death of the testator³.

1 As to entailed interests generally see REAL PROPERTY VOL 39(2) (Reissue) PARA 117 et seq. Entailed interests cannot be created by wills of testators dying on or after 1 January 1997; a gift in the will of such a testator purporting to create an entailed interest will not be effective to do so but will operate instead as a declaration that the property is held in trust for such beneficiary absolutely: see the Trusts of Land and Appointment of

Trustees Act 1996 s 2, Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 606, 676.

2 Between 1 January 1926 and 31 December 1996 inclusive entailed interests could be created in personal property as well as in real estate: see the Law of Property Act 1925 s 130(1)-(3), (6) (repealed); para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 606, 676.

3 Wills Act 1837 s 32 (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). The repeal of the Wills Act 1837 s 32 does not, however, affect any entailed interests created before 1 January 1997: Trusts of Land and Appointment of Trustees Act 1996 s 25(4).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/457. Gift to testator's issue; testator dying before 1983.

457. Gift to testator's issue; testator dying before 1983.

Under the will of a testator who died before 1 January 1983¹, where there is no contrary intention in the will², a devise or bequest of real or personal property to a child or other issue³ of the testator, for any estate or interest not determinable at or before the death of that child or issue, does not lapse if the devisee or legatee predeceased the testator leaving issue who were living at the testator's death, but takes effect as if the devisee or legatee had died immediately after the testator⁴, and becomes disposable under the will⁵ of the devisee or legatee, or as part of his estate if he dies intestate⁶. If the testator intended a gift to go over in the event of his child predeceasing him, he had expressly so to provide⁷.

This rule is also applicable in the case of a gift to a child dead at the date of the will⁸, or where the issue surviving the testator was not living at the death of the devisee or legatee⁹.

The gift must, however, be to the legatee as a designated individual¹⁰. The rule is not applicable where the gift is to a class not ascertainable until the testator's death¹¹, even where there happens to be only one member of the class¹², nor is it applicable to the lapse of a gift in joint tenancy where both the donees predecease the testator and one or both leave issue¹³.

1 The date on which the substitution of the Wills Act 1837 s 33 by the Administration of Justice Act 1982 s 19 came into effect: see s 76(11). Nothing in s 19 affects the will of a testator who died before that date: s 73(6) (c). As to the position where the testator died or dies on or after 1 January 1983 see PARA 459 post.

2 As to the expression of a contrary intention see *Re Morris, Corfield v Waller* (1916) 86 LJ Ch 456; *Re Meredith, Davies v Davies* [1924] 2 Ch 552; and see *Re Wilson, Lothian v Wilson* (1920) 89 LJ Ch 216.

3 The Wills Act 1837 s 33 (as originally enacted) does not apply to collateral relations of the testator (*Re Gresley's Settlement, Willoughby v Drummond* [1911] 1 Ch 358), and it does not apply to death without attaining a specified age where the attainment of such age is a condition of the bequest (*Re Wolson, Wolson v Jackson* [1939] Ch 780, [1939] 3 All ER 852).

In relation to testators who died on or after 1 January 1970 and before 1 January 1983, the Wills Act 1837 s 33 (as originally enacted) has effect as if the reference to a child or other issue of the testator (ie the intended beneficiary) included a reference to any illegitimate child of the testator and to anyone who would rank as such issue if he, or some other person through whom he descended from the testator, had been born legitimate; and as if the reference to the issue of the intended beneficiary included a reference to anyone who would rank as such issue if he, or some other person through whom he is descended from the intended beneficiary, had been born legitimate: Family Law Reform Act 1969 ss 16, 28(3) (s 16 repealed); Family Law Reform Act 1969 (Commencement No 1) Order 1969, SI 1969/1140, art 2. Personal representatives were, however, entitled, by virtue of the Family Law Reform Act 1969 s 17, to convey or distribute property without having ascertained that there was no person entitled to any interest by virtue of provisions of that Act. Section 17 was repealed with effect from 4 April 1988 by the Family Law Reform Act 1987 s 20. Personal representatives must now, therefore, protect themselves by eg advertisement under the Trustee Act 1925 s 27 (as amended) (see *Re Aldhous, Noble v Treasury Solicitor* [1955] 2 All ER 80, [1955] 1 WLR 459; and TRUSTS vol 48 (2007 Reissue) PARA 915).

4 Wills Act 1837 s 33 (as originally enacted).

5 *Johnson v Johnson* (1843) 3 Hare 157; *Re Mason's Will* (1865) 34 Beav 494. If the child of the testator dies bankrupt, the share goes to his trustee in bankruptcy: *Re Pearson, Smith v Pearson* [1920] 1 Ch 247 (following a dictum of Stirling LJ in *Re Scott* [1901] 1 KB 228 at 240, CA).

6 *Skinner v Ogle* (1845) 9 Jur 432; *Re Peerless, Peerless v Smith* [1901] WN 151.

7 *Re Mores' Trust* (1851) 10 Hare 171 at 178.

8 *Mower v Orr* (1849) 7 Hare 473; *Wisden v Wisden* (1854) 2 Sm & G 396.

9 *Re Parker* (1860) 1 Sw & Tr 523 (where a testatrix gave all her property to her daughter, and the daughter died in her lifetime leaving a child who also predeceased the testatrix, leaving a child who survived the testatrix). The rule was held to apply where the will was made before but republished after the Wills Act 1837 and the legatee or devisee died after that Act came into operation: *Winter v Winter* (1846) 5 Hare 306.

The rule has been held to apply to the case of a posthumous child born to the child who had died before the testator (*Re Griffiths' Settlement, Griffiths v Waghorne* [1911] 1 Ch 246), but such a posthumous child, it appears, is not 'living' within the Wills Act 1837 s 33 (as originally enacted) on the grounds that to treat the child as living would confer no direct benefit on him, and in effect *Re Griffiths' Settlement, Griffiths v Waghorne* supra has been overruled: *Elliot v Lord Joicey* [1935] AC 209 at 230, HL, per Lord Russell.

10 *Re Stansfield, Stansfield v Stansfield* (1880) 15 ChD 84. As to a gift to 'my surviving children' see *Fullford v Fullford* (1853) 16 Beav 565.

11 *Olney v Bates* (1855) 3 Drew 319; *Browne v Hammond* (1858) John 210; *Re Jackson, Shiers v Ashworth* (1883) 25 ChD 162 at 164. As to gifts to a class see PARAS 464-467 post.

12 *Re Harvey's Estate, Harvey v Gillow* [1893] 1 Ch 567; and see PARA 596 post.

13 *Re Butler, Joyce v Brew* [1918] 1 IR 394.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/458. Effect of death of issue; testator dying before 1983.

458. Effect of death of issue; testator dying before 1983.

The rule as to the prevention of lapse under the will of a testator who died before 1 January 1983¹ is aimed solely at preserving the gift to the child in the parent's will and does not in any way affect the administration of the estate of the deceased donee, which is administered in accordance with the law in force at the true date of his death². It is with reference to this true date, and not the fictitious date taken for the purpose of preserving the bequest, that the persons entitled on the donee's death are ascertained³. In other respects, however, the gift takes effect exactly as if the actual death of the devisee or legatee had happened immediately after the death of the testator, and with all the consequences of such a death⁴. The property devolves subject to any burden⁵ or condition⁶ which under the will would have been imposed on the devisee or legatee if he had survived the testator. Thus in the case of a testator who died before 1 January 1926, if a daughter of his died intestate in his lifetime, her surviving husband might take an estate by the curtesy⁷ in real estate devised to her by the will⁸.

1 As to this rule see PARA 457 ante.

2 *Re Hurd* [1941] Ch 196, [1941] 1 All ER 238.

3 *Re Basioli, McGahey v Depaoli* [1953] Ch 367, [1953] 1 All ER 301 (not following *Re Councill* (1871) LR 2 P & D 314 and *Re Allen's Trusts* [1909] WN 181).

4 *Johnson v Johnson* (1843) 3 Hare 157; *Eager v Furnivall* (1881) 17 ChD 115 at 118. Hence, if the child died a bankrupt, the benefit of the gift vests in the trustee in bankruptcy: see PARA 457 note 5 ante.

5 *Pickersgill v Rodger* (1876) 5 ChD 163 at 172.

6 Thus a direction that the share of a daughter should go over if she died unmarried takes effect if she died unmarried before the testator (*Kellett v Kellett* (1871) IR 5 Eq 298); and a direction that a share given to a daughter should be subject to the trusts of her marriage settlement takes effect notwithstanding that the daughter predeceased her father (*Re Hone's Trusts* (1883) 22 ChD 663). A legacy, however, saved from lapse by the fictitious survivorship created by the Wills Act 1837 s 33 (as originally enacted) is not caught by a covenant of the deceased legatee to settle property acquired during coverture: *Pearce v Graham* (1863) 9 Jur NS 568. See also *Re Blundell, Blundell v Blundell* [1906] 2 Ch 222 at 229.

7 See REAL PROPERTY vol 39(2) (Reissue) PARAS 157-160.

8 *Eager v Furnivall* (1881) 17 ChD 115; *Re Derbyshire, Webb v Derbyshire* [1906] 1 Ch 135. For a case where property specifically devised by a father to his son was in turn devised by the son to his father, and the son then predeceased his father leaving issue see *Re Hensler, Jones v Hensler* (1881) 19 ChD 612; but see *Re Basioli, McGahey v Depaoli* [1953] Ch 367 at 375, [1953] 1 All ER 301 at 304.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/459. Gift to testator's issue; testator dying after 1982.

459. Gift to testator's issue; testator dying after 1982.

Where the will of a testator who dies on or after 1 January 1983¹ contains a devise or bequest to a child or remoter descendant of the testator, and the intended beneficiary dies before the testator, leaving issue², and issue of the intended beneficiary are living at the testator's death, then, unless a contrary intention appears by the will³, the devise or bequest takes effect as a devise or bequest to the issue living at the testator's death⁴. As previously, if the testator intends a gift which would otherwise be subject to these provisions to go over to a different destination on the intended beneficiary's death, he must expressly so provide⁵. This rule is also applicable in the case of a gift to a child or remoter descendant dead at the date of the will⁶, or where the issue surviving the testator were not living at the death of the devisee or legatee⁷.

Issue are to take under these provisions through all degrees, according to their stock, in equal shares if more than one, any gift or share which their parent would have taken, but no issue may take whose parent is living at the testator's death and so capable of taking⁸.

1 The date on which the substitution of the Wills Act 1837 s 33 by the Administration of Justice Act 1982 s 19 came into effect: see s 76(11). Nothing in s 19 affects the will of a testator who died before that date: s 73(6) (c).

2 For this purpose, the illegitimacy of any person is to be disregarded (Wills Act 1837 s 33(4)(a) (s 33 substituted by the Administration of Justice Act 1982 s 19)); and a person conceived before the testator's death and born living thereafter is to be taken to have been living at the testator's death (Wills Act 1837 s 33(4)(b) (as so substituted)). Since under s 33 (as substituted) the gift devolves on the issue of the deceased child, an unborn child who is en ventre sa mère at the testator's death would, it is thought, be eligible on the general principle of construction established in *Elliott v Lord Joicey* [1935] AC 209, HL: see PARA 457 note 9 ante.

3 As to the expression of a contrary intention see the cases cited in PARA 457 note 2 ante.

4 Wills Act 1837 s 33(1) (as substituted: see note 2 supra). As to class gifts to children see PARA 467 post.

5 See *Re Mores' Trust* (1851) 10 Hare 171 at 178.

6 See PARA 457 note 8 ante.

7 See PARA 457 note 9 ante.

8 Wills Act 1837 s 33(3) (as substituted: see note 2 supra).

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460. Gift to testator's issue; exercise of appointment.

A gift under a general power of appointment to a child predeceasing the testator and leaving issue is preserved from lapse¹, but not a gift under a special power², or a power of charging given under a will to a life tenant who dies before the testator³.

1 See the Wills Act 1837 ss 27, 33 (s 33 substituted by the Administration of Justice Act 1982 s 19); and *Eccles v Cheyne* (1856) 2 K & J 676. See also POWERS vol 36(2) (Reissue) PARA 310. The Wills Act 1837 s 33 (as substituted) does not materially differ from the wording of s 33 (as originally enacted) and the principle stated in the text continues to apply.

2 *Griffiths v Gale* (1844) 12 Sim 327, 354; *Freeland v Pearson* (1867) LR 3 Eq 658; *Holyland v Lewin* (1884) 26 ChD 266, CA. See further POWERS vol 36(2) (Reissue) PARA 303.

3 *Griggs v Gibson, Maynard v Gibson (No 2)* (1866) 35 LJ Ch 458.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/461. Settled shares.

461. Settled shares.

A bequest of an absolute interest in a fixed share of residue to a named person followed by a direction settling the share does not lapse by reason of the legatee's death in the lifetime of the testator¹. The testator may make it clear that the trusts of shares directed to be settled are to take effect only if the person to whom the gift is given in the first instance survives the testator. If he does not survive, the share may lapse if given to a named individual² or, it seems, accrue to other shares if given to a class³.

1 *Re Speakman, Unsworth v Speakman* (1876) 4 ChD 620; *Re Pinhorn, Moreton v Hughes* [1894] 2 Ch 276; *Re Powell, Campbell v Campbell* [1900] 2 Ch 525; *Re Harward, Newton v Bankes* [1938] Ch 632, [1938] 2 All ER 804 (where a legacy given absolutely by the will was settled by a codicil). See also *Re Whitmore, Walters v Harrison* [1902] 2 Ch 66, CA; *Re Walter, Turner v Walter (No 2)* (1912) 56 Sol Jo 632, CA; cf *Re Taylor, Taylor v Taylor* [1931] 2 Ch 237 (share to which legatee 'shall become entitled').

2 *Re Roberts, Tarleton v Bruton* (1885) 30 ChD 234, CA.

3 *Stewart v Jones* (1859) 3 De G & J 532. As to class gifts see PARAS 464-467 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/462. Future gifts.

462. Future gifts.

A legacy to a legatee to become vested at the expiration of a specified period from a testator's death apparently fails if the legatee does not survive the period¹. If, however, a testator directs payment of the income of a fund for a specified period after his death to one person followed by a bequest of the capital to another, the bequest of the capital does not lapse by that other's death prior to the expiration of the period², nor does the death of a prospective life tenant in the testator's lifetime cause a gift in remainder³ or a contingent limitation over⁴ to lapse, although the gift over may lapse from other causes⁵. A bequest in remainder following an absolute gift which would otherwise be void for repugnancy may be rendered valid by the lapse of the prior gift⁶.

1 *Smell v Dee* (1707) 2 Salk 415; *Bruce v Charlton* (1842) 13 Sim 65; *Re Eve, Belton v Thompson* (1905) 93 LT 235. See also *Re Laing, Laing v Morrison* [1912] 2 Ch 386. As to cases where payment but not vesting is postponed see PARA 699 post.

2 *Re Bennett's Trust* (1857) 3 K & J 280; *Re Boam, Shorthouse v Annibal* (1911) 56 Sol Jo 142.

3 *Habergham v Ridehalgh* (1870) LR 9 Eq 395 at 400.

4 *Rackham v De La Mare* (1864) 2 De GJ & Sm 74 (where there was a gift to A for life and after her death to her children, with a gift over in case no child attained a vested interest, and A died in the lifetime of the testator). See also *Re Green's Estate* (1860) 1 Drew & Sm 68; and PARA 732 post.

5 *Williams v Jones* (1826) 1 Russ 517.

6 *Re Lowman, Devenish v Pester* [1895] 2 Ch 348, CA; *Re Dunstan, Dunstan v Dunstan* [1918] 2 Ch 304. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1084. As to the acceleration of subsequent interests on lapse see PARA 472 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/463. Gifts to tenants in common or joint tenants.

463. Gifts to tenants in common or joint tenants.

The doctrine of lapse applies to a devise¹ or bequest² to persons as tenants in common, not being a gift to a class³ or group⁴, unless a contrary intention is expressed in the will⁵, and the result is that the share of any tenant in common dying before the testator lapses⁶. Lapse also occurs when the share of a tenant in common is revoked⁷. The intention that the share of residue is not to lapse, but is to be taken by the others of the named persons, may be shown by a direction that that share is to fall into residue⁸ or by other means⁹.

Where, however, property is devised or bequeathed to joint tenants and one of them dies in the testator's lifetime, the doctrine of survivorship prevents a lapse occurring, and the survivor or survivors take the whole¹⁰. Similarly, if the interest of one of the joint tenants is revoked, the others take the whole and there is no lapse¹¹.

1 *Ackroyd v Smithson* (1780) 1 Bro CC 503. See also *Digby v Legard* (1774) cited in 3 P Wms at 21.

2 *Bagwell v Dry* (1721) 1 P Wms 700; *Page v Page* (1728) 2 P Wms 489; *Peat v Chapman* (1750) 1 Ves Sen 542; *Re Whiston, Whiston v Woolley* [1924] 1 Ch 122, CA. It may, however, appear from the will that the distribution is to be among such of the named persons as are living at the date of the will: *Re Sharp, Maddison v Gill* [1908] 2 Ch 190, CA. In *Re Featherstone's Trusts* (1882) 22 ChD 111, a direction that the shares should be 'vested legacies' at the time of the testator's death was held to confine the gift to legatees living at his death, but that case is not an authority beyond the particular facts: *Re Whiston, Whiston v Woolley* supra; and see *Haverghal v Harrison* (1843) 7 Beav 49.

3 As to class gifts see PARAS 464-467 post. A gift to the children of A, adding their names, is not a class gift, and is subject to lapse: see PARA 465 text and note 9 post.

4 *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98.

5 See the cases cited in notes 8-9 infra.

6 The settlement of the share to which a child 'shall become entitled' does not prevent a lapse if the child predeceases the testator: *Re Taylor, Taylor v Taylor* [1931] 2 Ch 237. It seems, however, that, if one of the named persons has been previously referred to in the will as dead, the fund is divisible among the others and there is no lapse: *Clarke v Clemmans, Selway v Clemmans* (1866) 36 LJ Ch 171; and see *Re Sharp, Maddison v Gill* [1908] 1 Ch 372 (affd [1908] 2 Ch 190, CA).

7 *Owen v Owen* (1738) 1 Atk 494; *Cresswell v Cheslyn* (1762) 2 Eden 123 (affd (1763) 3 Bro Parl Cas 246) (approved in *Shaw v M'Mahon* (1843) 4 Dr & War 431 at 438 per Sugden LC, in spite of doubts expressed by Serjeant Hill in 2 Eden 125n); *Ramsay v Shelmerdine* (1865) LR 1 Eq 129; *Sykes v Sykes* (1868) 3 Ch App 301; *Re Forrest, Carr v Forrest* [1931] 1 Ch 162; *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576, [1955] 2 All ER 625.

8 *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369, CA (overruling on this ground *Humble v Shore* (1847) 1 Hem & M 550n); *Re Allan, Dow v Cassaigne* [1903] 1 Ch 276, CA; *Re Wand, Escritt v Wand* [1907] 1 Ch 391. See also PARA 589 post.

9 *Harris v Davis* (1844) 1 Coll 416; *Vaudrey v Howard* (1853) 2 WR 32; *Re Hornby's Will* (1859) 7 WR 729; *Re Spiller, Spiller v Madge* (1881) 18 ChD 614; *Re Radcliffe, Young v Beale* (1903) 51 WR 409; *Watson v Donaldson* [1915] 1 IR 63, Ir CA; *Re Wilkins, Wilkins v Wilkins* [1920] 2 Ch 63; *Re Clay, Spencer v Clay* (1922) 153 LT Jo 473; *Re Woods, Woods v Creagh* [1931] 2 Ch 138. In *Re Whiting, Ormond v De Launay* [1913] 2 Ch 1, the mere confirmation of the will in other respects was held sufficient to give the revoked share to the other legatees; but cf *Cheslyn v Cresswell* (1763) 3 Bro Parl Cas 246; *Humble v Shore* (1847) 1 Hem & M 550n (apparently not affected on this ground by *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369, CA); *Re Wood's Will* (1861) 29 Beav 236; *Sykes v Sykes* (1868) 3 Ch App 301 (where there were words in the codicil confirming the will: see *Re Whiting, Ormond v De Launay* supra at 3). The decision in *Re Whiting, Ormond v De Launay* supra was not followed in *Re Wilkins, Wilkins v Wilkins* supra, was doubted in *Re Forrest, Carr v Forrest* [1931] 1 Ch 162, and was distinguished in *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576, [1955] 2 All ER 625.

10 *Davies v Kempe* (1663) 1 Eq Cas Abr 216 pl 7; *Willing v Baine* (1731) 3 P Wms 113; *Buffar v Bradford* (1741) 2 Atk 220; *Morley v Bird* (1798) 3 Ves 629.

11 *Humphrey v Tayleur* (1752) Amb 136 at 137-138; and see *Sykes v Sykes* (1867) LR 4 Eq 200 at 204-205 (affd (1868) 3 Ch App 301) (tenancy in common).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/464. Class gifts.

464. Class gifts.

In the case of a gift to a fluctuating¹ class², or group³, as tenants in common, to be ascertained at any particular time, no lapse occurs if a member of the class dies before that time, the class being automatically contracted⁴. Similarly, where a member of the class is precluded from participation either expressly by exception or revocation⁵, or by his attesting the will⁶, there is no lapse, and the property is divided among those members who are capable of taking. This rule is not, however, applicable where an appointment is made under a power to objects and non-objects; in such a case the part invalidly appointed goes as in default of appointment⁷.

A proviso in a class gift that the share of any member predeceasing the testator and leaving issue is not to lapse, but is to go to his executors, does not cause the share of a member dying without issue to lapse so as to exclude the other members of the class from taking the share⁸.

¹ The rule applies whether the class fluctuates by increase or diminution, or by diminution alone: see *Lee v Pain* (1844) 4 Hare 201 at 250; *Leigh v Leigh* (1854) 17 Beav 605; *Dimond v Bostock* (1875) 10 Ch App 358; *Viner v Francis* (1789) 2 Bro CC 658.

2 As to what constitutes a class gift see PARA 465 post.

3 *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98.

4 *Viner v Francis* (1789) 2 Bro CC 658; *Doe d Stewart v Sheffield* (1811) 13 East 526; *Shuttleworth v Greaves* (1838) 4 My & Cr 35; *M'Kay v M'Kay* [1900] 1 IR 213; *Re Dunster, Brown v Heywood* [1909] 1 Ch 103. See also *Re Maynard, Pearce v Pearce* [1930] WN 127.

5 *Re Dunster, Brown v Heywood* [1909] 1 Ch 103; and see *Shaw v M'Mahon* (1843) 4 Dr & War 431; *Clark v Phillips* (1853) 17 Jur 886; *M'Kay v M'Kay* [1900] 1 IR 213. See also *Re Jackson, Shiers v Ashworth* (1883) 25 ChD 162 (to all testator's children born or to be born except his son A). In the case of a gift to named persons 'or such of them as shall be living at my death', the named persons constitute a quasi-class and there is a right of survivorship: see *Re Woods, Woods v Creagh* [1931] 2 Ch 138. See also *Watson v Donaldson* [1915] 1 IR 63, Ir CA.

6 *Fell v Biddolph* (1875) LR 10 CP 701. See also *Young v Davies* (1863) 2 Drew & Sm 167; *Re Coleman and Jarrom* (1876) 4 ChD 165 at 173. As to the failure of gifts to witnesses see PARA 343 ante.

7 *Re Farncombe's Trusts* (1878) 9 ChD 652; and see POWERS vol 36(2) (Reissue) PARA 353.

8 *Aspinall v Duckworth* (1866) 35 Beav 307.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/465. Meaning of 'class gift'.

465. Meaning of 'class gift'.

Prima facie a class gift is a gift to a class of persons included and comprehended under some general description and bearing a certain relation to the testator or another person or united by some common tie¹. Thus where a testator divides his residue into as many equal shares as he shall have children surviving him, or predeceasing him leaving issue, and gives a share to or in trust for each such child, the gift is to a class². There may also be a class compounded of persons answering one or other of alternative descriptions, for example 'the children of A and the children of B'³, or 'the children of A who attain 21 and the issue of such as die under that age'⁴.

A gift may be nonetheless a gift to a class because some of the members are referred to by name⁵, or because a person who would otherwise fall within the class is excluded by name⁶. A gift to one person and the children of another is not, however, regarded as a class gift⁷ unless there is something in the context to show that the testator intended to form a class or group⁸, and gifts to several persons designated by name⁹ or number¹⁰ or by reference¹¹ are not class gifts, and are liable to lapse unless a joint tenancy is created¹² or words are added implying a contingency¹³.

1 *Kingsbury v Walter* [1901] AC 187, HL. See also *Viner v Francis* (1789) 2 Bro CC 658; *Re Chaplin's Trusts* (1863) 33 LJ Ch 183; *Pearks v Moseley* (1880) 5 App Cas 714 at 723, HL, Lord Selbourne LC; *Re Featherstone's Trusts* (1882) 22 ChD 111 (as to the restriction of this case to its particular facts see *Re Whiston, Whiston v Woolley* [1924] 1 Ch 122, CA); *Re Maynard, Pearce v Pearce* [1930] WN 127. As to the application of the rule against perpetuities to class gifts see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1071 et seq.

2 *Re Dunster, Brown v Heywood* [1909] 1 Ch 103 (not following *Ramsay v Shelmerdine* (1865) LR 1 Eq 129). See also *Shaw v M'Mahon* (1843) 4 Dr & War 431.

3 *Kingsbury v Walter* [1901] AC 187 at 193, HL, per Lord Davey. See also *Best v Stonehewer* (1865) 2 De GJ & Sm 537.

4 *Pearks v Moseley* (1880) 5 App Cas 714 at 722, HL, per Lord Selbourne LC. As to the identification of donees see PARA 347 ante.

5 *Kingsbury v Walter* [1901] AC 187, HL. See also *Shaw v M'Mahon* (1843) 4 Dr & War 431 (to all my children, including A and B); *Re Stanhope's Trusts* (1859) 27 Beav 201 (to four named daughters, and 'all my after-born daughters'); *Re Jackson, Shiers v Ashworth* (1883) 25 ChD 162; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197. A gift to persons all individually named, or all so described as to be fixed at the time of the gift, and so that there is no fluctuation, is not a class gift: *Cruse v Howell* (1858) 4 Drew 215.

6 *Re Jackson, Shiers v Ashworth* (1883) 25 ChD 162. See also *Dimond v Bostock* (1875) 10 Ch App 358.

7 *Re Wood's Will* (1862) 31 Beav 323; *Re Chaplin's Trusts* (1863) 33 LJ Ch 183 (gift to A and all the children of B); *Re Allen, Wilson v Atter* (1881) 44 LT 240; *Re Venn, Lindon v Ingram* [1904] 2 Ch 52 (gift to the brothers and sisters of A living at her decease and B, C and D in equal shares).

8 *Kingsbury v Walter* [1901] AC 187 at 193, HL, per Lord Davey. See also *Drakeford v Drakeford* (1863) 33 Beav 43 at 48; *Aspinall v Duckworth* (1866) 35 Beav 307; *Re Woods, Woods v Creagh* [1931] 2 Ch 138; *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98.

9 *Cresswell v Cheslyn* (1762) 2 Eden 123 (to my sons A and B and my daughter C); *Bain v Lescher* (1840) 11 Sim 397 (gift to the children of A, namely B, C and D); *Burrell v Baskerfield* (1849) 11 Beav 525; *Re Hull's Estate* (1855) 21 Beav 314; *Sykes v Sykes* (1867) LR 4 Eq 200; *Spencer v Wilson* (1873) LR 16 Eq 501; *Re Bentley, Podmore v Smith* (1914) 110 LT 623. See also *Cruse v Howell* (1858) 4 Drew 215; *Re Ramadge* [1969] NI 71 (to my four cousins A, B, C and D in equal shares).

10 *Jacob v Catling* [1881] WN 105. See also *Re Smith's Trusts* (1878) 9 ChD 117; *Re Stansfield, Stansfield v Stansfield* (1880) 15 ChD 84.

11 Eg 'to all the before-mentioned legatees in proportion to their legacies': *Re Gibson's Trusts* (1861) 2 John & H 656; *Nicholson v Patrickson* (1861) 3 Giff 209. The same principle applies to a beneficial gift 'to my executors herein named' (*Barber v Barber* (1838) 3 My & Cr 688; *Hoare v Osborne* (1864) 10 Jur NS 383, 694), but not where the gift is to executors in their official capacity (*Knight v Gould* (1833) 2 My & K 295; *Parsons v Saffery* (1821) 9 Price 578).

12 See PARA 463 ante.

13 Eg a gift to a testator's five great-nieces, A, B, C, D and E equally, to be divided between them if more than one: *Sanders v Ashford* (1860) 28 Beav 609. See also *Re Hornby's Will* (1859) 7 WR 729 (to A, B, C and D 'if living'); *Re Spiller, Spiller v Madge* (1881) 18 ChD 614; *Re Woods, Woods v Creagh* [1931] 2 Ch 138; *Re Peacock, Midland Bank Executor and Trustee Co Ltd v Peacock* [1957] Ch 310, [1957] 2 All ER 98.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/466. Issue of deceased child; testator dying before 1983.

466. Issue of deceased child; testator dying before 1983.

Under the will of a testator who died before 1 January 1983¹, where there is a gift to the children of the testator as a class, a child of the testator who died in his lifetime leaving issue living at the testator's death is not, by virtue of the provision saving gifts to children who so die², included as a member of the class³, and the other members of the class who survive the testator take the subject of the gift between them⁴. However, by suitable words the testator might have substituted the issue of a member of the class for their parent so as to make such issue members of the class⁵.

1 Ie the date on which the substitution of the Wills Act 1837 s 33 by the Administration of Justice Act 1982 s 19 came into effect: see s 76(11). Nothing in s 19 affects the will of a testator who died before that date: s 73(6) (c). As to the position under the will of a testator dying on or after 1 January 1983 see PARA 467 post.

2 Ie the Wills Act 1837 s 33 (as originally enacted): see PARA 457 ante.

3 See PARA 457 ante.

4 *Re Coleman and Jarrom* (1876) 4 ChD 165 at 168.

5 *Aspinall v Duckworth* (1866) 35 Beav 307; *Re Greenwood, Greenwood v Sutcliffe* [1912] 1 Ch 392; *Re Cousen's Will Trusts, Wright v Killick* [1937] Ch 381 at 391, [1937] 2 All ER 276 at 283-284.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(6) LAPSE/(ii) Exceptions from Lapse/467. Issue of deceased child; testator dying after 1982.

467. Issue of deceased child; testator dying after 1982.

Where the will of a testator who dies on or after 1 January 1983¹ contains a devise or bequest to a class of persons consisting of children or remoter descendants of the testator, and a member of the class dies before the testator, leaving issue, and issue of that member are living at the testator's death, then, unless a contrary intention appears by the will², the devise or bequest takes effect as if the class included the issue of its deceased member living at the testator's death³. Lapse is also excluded where the gift to the children or remoter issue is contingent on surviving the testator by a specified period⁴.

For this purpose, issue take through all degrees, according to their stock, in equal shares if more than one, any gift or share which their parent would have taken, but no issue may take whose parent is living at the testator's death and so capable of taking⁵. Further, the illegitimacy of any person is to be disregarded⁶; and a person conceived before the testator's death and born living thereafter is to be taken to have been living at the testator's death⁷.

1 The date on which the substitution of the Wills Act 1837 s 33 by the Administration of Justice Act 1982 s 19 came into effect: see s 76(11). Nothing in s 19 affects the will of a testator who died before that date: s 73(6)(c). As to the position where the testator dies before 1 January 1983 see PARA 466 ante.

2 As to the expression of a contrary intention see the cases cited in PARA 457 note 2 ante.

3 Wills Act 1837 s 33(2) (substituted by the Administration of Justice Act 1982 s 19).

4 *Ling v Ling* [2002] WTLR 553.

5 Wills Act 1837 s 33(3) (as substituted: see note 3 supra).

6 *Ibid* s 33(4)(a) (as substituted: see note 3 supra).

7 *Ibid* s 33(4)(b) (as substituted: see note 3 supra).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(7) DISSOLUTION OR ANNULMENT OF MARRIAGE OR CIVIL PARTNERSHIP/468. Dissolution or annulment of marriage; deaths after 1982 and before 1996.

(7) DISSOLUTION OR ANNULMENT OF MARRIAGE OR CIVIL PARTNERSHIP

468. Dissolution or annulment of marriage; deaths after 1982 and before 1996.

Where, after a testator has made a will, his marriage is dissolved or annulled¹, and he dies on or after 1 January 1983² but before 1 January 1996³:

- 37 (1) the will takes effect as if any appointment of the former spouse as an executor and trustee of the will were omitted⁴; and
 38 (2) any devise or bequest to the former spouse lapses⁵,

except in so far as a contrary intention appears by the will⁶.

For these purposes, 'lapse' does not have its usual meaning⁷; and the use of the term does not have the result that the spouse, if surviving the testator, is treated as having predeceased him for the purposes of determining the rights of succession to his estate⁸. Thus where a testator left his entire estate to his wife with a gift over in favour of charity if his wife should predecease him or fail to survive him by one month and the marriage was subsequently dissolved and the wife survived him by one month, the gift over was held not to take effect and the estate was held to be undisposed of⁹.

Where, however, by the terms of a will an interest in remainder is subject to a life interest and the life interest lapses by virtue of head (2) above, the interest in remainder is to be treated as if it had not been subject to the life interest¹⁰ and, if it was contingent on the termination of the life interest, as if it had not been so contingent¹¹.

Any failure of a devise or bequest by virtue of head (2) above is without prejudice to any right of the former spouse to apply¹² for reasonable financial provision¹³.

1 As originally enacted, the Wills Act 1837 s 18A (as added) applied only where the marriage had been dissolved, annulled or declared void by a decree of 'a court'; but s 18A (as added) was subsequently amended by the Family Law Act 1986 s 53 with effect from 4 April 1988 so as to apply where the marriage has been dissolved or annulled by a decree of a court of civil jurisdiction in England and Wales (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 317 et seq), or the marriage has been dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Pt II (ss 44-54) (as amended) (see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 253 et seq).

2 Ie the date on which the Wills Act 1837 s 18A (as added) came into force in relation to deaths on or after that date: Administration of Justice Act 1982 s 76(11). Nothing in the Wills Act 1837 s 18A (as added) affects the will of a testator who died before 1 January 1983: Administration of Justice Act 1982 s 73(6)(b). Where, however, the death occurs on or after 1 January 1983, the Wills Act 1837 s 18A (as added) applies even if the will was made or the marriage dissolved, annulled or declared void on or after that date.

3 Ie the date with effect from which *ibid* s 18A (as added) was amended by the Law Reform (Succession) Act 1995 ss 3, 5, Schedule in relation to deaths on or after that date: see PARA 469 post.

4 Wills Act 1837 s 18A(1)(a) (added by the Administration of Justice Act 1982 s 18(2)).

5 *Ibid* s 18A(1)(b) (as added: see note 4 *supra*).

6 *Ibid* s 18A(1) (as added: see note 4 *supra*).

7 The expression 'lapse' usually means the failure of a testamentary gift owing to the death of the donee in the testator's lifetime: see PARA 450 et seq ante.

8 *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446, [1985] 1 All ER 1066, CA (overruling *Re Cherrington* [1984] 2 All ER 285, [1984] 1 WLR 772).

9 *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446, [1985] 1 All ER 1066, CA.

10 As to the acceleration of subsequent interests generally see PARA 472 post.

11 Wills Act 1837 s 18A(3) (as added: see note 4 *supra*). This provision has been repealed in respect of deaths on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 5, Schedule.

12 Ie under the Inheritance (Provision for Family and Dependents) Act 1975: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq.

13 Wills Act 1837 s 18A(2) (as added: see note 4 *supra*).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(7) DISSOLUTION OR ANNULMENT OF MARRIAGE OR CIVIL PARTNERSHIP/469. Dissolution or annulment of marriage; deaths after 1995.

469. Dissolution or annulment of marriage; deaths after 1995.

Where, after a testator has made a will, a decree¹ of a court of civil jurisdiction in England and Wales dissolves or annuls his marriage, or his marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales², and he dies on or after 1 January 1996³:

- 39 (1) any provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint as executor or trustee, or confer the power on, the former spouse, take effect as if the former spouse had died on the date of the dissolution or annulment⁴; and
- 40 (2) any property which, or an interest in which, is devised or bequeathed to the former spouse passes as if the former spouse had died on that date⁵.

Any failure of a devise or bequest by virtue of head (2) above is without prejudice to any right of the former spouse to apply⁶ for reasonable financial provision⁷.

1 As from a day to be appointed, the Wills Act 1837 s 18A(1) (as added and amended) is further amended so as to refer to an order or decree instead of to a decree: see s 18A(1) (s 18A added by the Administration of Justice Act 1982 s 18(2); the Wills Act 1837 s 18A(1) amended by the Family Law Act 1986 s 53; and the Wills Act 1837 s 18A(1) prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 1). At the date at which this volume states the law, no such day had been appointed. The Family Law Act 1996 provides for orders dissolving a marriage to be known as 'divorce orders' and not as 'decrees of divorce'. See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

2 Ie by virtue of the Family Law Act 1986 Pt II (ss 44-54) (as amended): see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 253 et seq.

3 Ie the date with effect from which the Wills Act 1837 s 18A (as originally added) was amended by the Law Reform (Succession) Act 1995 s 3, 5, Schedule in respect of deaths on or after that date, regardless of the date of the will and the date of the dissolution or annulment: s 3(2).

4 Wills Act 1837 s 18A(1)(a) (s 18A(1) as added and amended (see note 1 supra); and s 18A(1)(a), (b) substituted by the Law Reform (Succession) Act 1995 s 3).

5 Wills Act 1837 s 18A(1)(b) (s 18A(1) as added and amended (see note 1 supra); and s 18A(1)(b) as substituted (see note 4 supra)). This effectively reverses *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446, [1985] 1 All ER 1066, CA (cited in PARA 468 note 8 ante).

6 Ie under the Inheritance (Provision for Family and Dependents) Act 1975: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq.

7 Wills Act 1837 s 18A(2) (as added: see note 1 supra). Section 18A(2) (as added) remains unaffected by the amendments made by the Law Reform (Succession) Act 1995 ss 3, 5, Schedule.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(7) DISSOLUTION OR ANNULMENT OF MARRIAGE OR CIVIL PARTNERSHIP/470. Dissolution or annulment of civil partnership; prospective reform.

470. Dissolution or annulment of civil partnership; prospective reform.

As from a day to be appointed, the following provisions have effect¹. If, after a testator has made a will, a court of civil jurisdiction in England and Wales dissolves or annuls his civil partnership, or his civil partnership is dissolved or annulled and the dissolution or annulment is entitled to recognition in England and Wales², except in so far as a contrary intention appears by the will:

- 41 (1) provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former civil partner, take effect as if the former civil partner had died on the date of the dissolution or annulment³; and
- 42 (2) any property which, or an interest in which, is devised or bequeathed to the former civil partner passes as if the former civil partner had died on that date⁴.

Any failure of a devise or bequest by virtue of head (2) above is without prejudice to any right of the former civil partner to apply⁵ for reasonable financial provision⁶.

1 The Wills Act 1837 s 18C is prospectively added by the Civil Partnership Act 2004 s 71, Sch 4 paras 1, 2. At the date at which this volume states the law, no day had been appointed for the commencement of this provision (but see PARA 382 note 1 ante). As to civil partnerships see PARA 382 ante.

2 Ie by virtue of ibid Pt 5 Ch 3 (ss 219-238).

3 See the Wills Act 1837 s 18C(1), (2)(a) (prospectively added: see note 1 supra).

4 See ibid s 18C(1), (2)(b) (prospectively added: see note 1 supra).

5 Ie under the Inheritance (Provision for Family and Dependents) Act 1975: see EXECUTORS AND ADMINISTRATORS.

6 See the Wills Act 1837 s 18C(3) (prospectively added: see note 1 supra).

UPDATE

470 Dissolution or annulment of civil partnership; prospective reform

TEXT AND NOTE 1--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(8) EFFECT OF FAILURE AND LAPSE/471. General rule.

(8) EFFECT OF FAILURE AND LAPSE

471. General rule.

As a general principle, unless the testator provides otherwise, all gifts, other than gifts of shares or interests in the general residue, which lapse or fail fall into the general residue¹. If there is no residuary devise or bequest, or if the gift which lapses or fails is of a share or interest in the general residue, the gift passes to those entitled on an intestacy². There may be a particular residuary gift, or a gift of the residue of a particular description of property, a specific part of which is the subject of a prior gift, and it may appear that on the failure of the prior gift the subject matter is to fall into the particular residue³. Surplus income of residue

which is not expressly and validly disposed of during the life of an annuitant does not normally pass under a gift of capital after the death of the annuitant, but passes as on an intestacy⁴.

Where the will contains an alternative gift which is expressed to have effect in the event of the donee under the failed gift predeceasing the testator, the alternative gift will not normally be construed as operating where the donee survives the testator and the failure of the gift is for some other reason⁵.

1 A gift of land 'not hereinbefore devised' (*Green v Dunn* (1855) 20 Beav 6), or of property 'not . . . disposed of' (*Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506 at 522-523, [1947] 2 All ER 854 at 862-863; affd [1948] 1 Ch 118, [1947] 2 All ER 854 at 864, CA), carries the land or the property, as the case may be, ineffectively disposed of.

2 See further PARA 474 post. As to residuary estate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 531-534; and as to intestate succession see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq. A specific legacy passes on disclaimer under a residuary gift: *Re Backhouse, Westminster Bank Ltd v Shaftesbury Society and Ragged School Union* [1931] WN 168. As to undisposed of interests passing on an intestacy in the absence of a residuary gift see *Hughes v McNaul* [1923] 1 IR 78, Ir CA; *Re Galway* [1944] NI 28. As to the destination of income undisposed of where there is a trust to accumulate for a period exceeding that permitted by law see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1146, 1149. As to the destination of property directed to be converted where the objects of conversion wholly or partially fail see *Re Hopkinson, Dyson v Hopkinson* [1922] 1 Ch 65; *M'Dermott v A-G (No 2)* [1923] 1 IR 142, CA. As to the effect of the failure of objects see EQUITY vol 16(2) (Reissue) PARAS 710-711; and as to the limited importance of the doctrine of conversion after 31 December 1925 see EQUITY vol 16(2) (Reissue) PARA 712. Where trusts for sale were imposed expressly by the trust instrument, then, unless the trust was created by the will of a testator who died before 1 January 1997, the existence of the duty to sell no longer means that the land is to be regarded as personal property: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. Thus the doctrine of conversion is now of even more limited importance but it is not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq.

3 See eg *Malcolm v Taylor* (1831) 2 Russ & M 416; *De Trafford v Tempest* (1856) 21 Beav 564; *Burke Irwin's Trusts, Barrett v Barrett* [1918] 1 IR 350. Any property of which the testator fails to dispose, either because his will does not contain a gift of general residue, or because a gift of residue does not take effect, is resorted to as the first fund available for the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable out of the testator's estate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 417. As to the persons entitled on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

4 *Re Wragg, Hollingsworth v Wragg* [1959] 2 All ER 717, [1959] 1 WLR 922, CA (distinguishing *Re Shuckburgh's Settlement, Robertson v Shuckburgh* [1901] 2 Ch 794); *Re Nash, Miller v Allen* [1965] 1 All ER 51, [1965] 1 WLR 221. See also *Re Geering, Gulliver v Geering* [1964] Ch 136, [1962] 3 All ER 1043. The income passes under the gift of capital only if there is some context which enables 'after the death' of the annuitant to be interpreted as 'subject to the interest' of the annuitant: *Re Wragg, Hollingsworth v Wragg* supra. For instances where there has been no such context see PARA 706 note 4 post. As to the destination of income undisposed of where there is a trust to accumulate for a period exceeding that permitted by law see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1146-1149.

5 *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446, [1985] 1 All ER 1066, CA (failure of gift as a result of divorce: see PARA 468 ante); *Re Robertson, Marsden v Marsden* (1963) 107 Sol Jo 318; *Re Hunter's Executors, Petitioners* 1992 SLT 1141; *Re Jones, Jones v Midland Bank Trust Co Ltd* [1997] 3 FCR 697, [1998] 1 FLR 246, CA (in all the last three cases there was failure of a gift as a result of the donee killing the testator: see PARA 341 note 7 ante). Disclaimer (see PARA 442 ante) is another example of failure of a gift where such an alternative gift would normally not be effective. An exception is where there has been a dissolution or annulment of the testator's marriage and the testator dies on or after 1 January 1996, in which case the Wills Act 1837 s 18A (as added and amended) treats the former spouse as dead for the purposes of devolution of any property given to the former spouse: see PARA 469 ante. As to the dissolution and annulment of civil partnerships see PARA 470 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(8) EFFECT OF FAILURE AND LAPSE/472. Acceleration of subsequent interests.

472. Acceleration of subsequent interests.

The effect of failure of a prior life interest or other particular interest through the donee of that interest being dead or prevented by law from taking the gift¹, for example owing to the attestation of the will by him or his spouse or his civil partner², or through revocation by codicil³, disclaimer⁴, forfeiture⁵ or lapse⁶, is ordinarily to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest, but the will may expressly or impliedly indicate a contrary intention⁷. Acceleration may take place even though the effect may be to alter the class of persons designated to take by accelerating the time for ascertaining the class⁸. This will, however, be so only where the terms of the will are consistent with an intention to distribute at a moment which may be anterior to the birth of all the members of the class⁹. Where the trusts following the prior interest are not absolutely vested remainders but are vested subject to being divested, the court will not misconstrue the will in order to give effect to the doctrine of acceleration; and the effect of a disclaimer is that the residuary estate is held on trust for the remaindermen subject to the defeasance clause¹⁰. The court construes gifts of subsequent interests as intended to take effect on the failure or determination of the prior interest in any manner¹¹. A failure of a prior gift does not, however, accelerate a subsequent executory limitation not taking effect merely on the determination of the prior interests¹²; and subsequent gifts cannot be accelerated where the persons who are to take under them are not in existence¹³ or their interests are contingent¹⁴.

1 *Anon* (1431) YB 9 Hen 6 fo 24b; Perkins' Profitable Book s 567. As to the acceleration of interests in remainder subject to a life interest to a spouse or civil partner when the marriage or civil partnership is dissolved or annulled see PARAS 468-470 ante.

2 *Jull v Jacobs* (1876) 3 ChD 703; *Re Clark, Clark v Randall* (1885) 31 ChD 72 (explained in *Aplin v Stone* [1904] 1 Ch 543 at 547-548). See also *Burke v Burke* (1899) 18 NZLR 216; *Re Maybee* (1904) 8 OLR 601. As to the effect of such attestation see PARA 343 ante.

3 *Lainson v Lainson* (1854) 5 De GM & G 754; *Evestaff v Austin* (1854) 19 Beav 591; *Re Love, Green v Tribe* (1878) 47 LJ Ch 783; *Stephenson v Stephenson* (1885) 52 LT 576; *Re Johnson, Danily v Johnson* (1893) 68 LT 20; *Re Whitehorne, Whitehorne v Best* [1906] 2 Ch 121; *Re Salmonsens, National Provincial Bank Ltd v Salmonsens* (1965) 109 Sol Jo 477. As to revocation by codicil see PARA 387 ante.

4 *Anon* (1459) YB 37 Hen 6 fo 35 pl 23; *Re Scott, Scott v Scott* [1911] 2 Ch 374 at 377; *Re Young, Fraser v Young* [1913] 1 Ch 272 at 275; *Re Willis, Crossman v Kirkaldy* [1917] 1 Ch 365; *Re Hodge, Midland Bank Executor and Trustee Co Ltd v Morrison* [1943] Ch 300, [1943] 2 All ER 304; *Re Davies, Davies v Mackintosh* [1957] 3 All ER 52, [1957] 1 WLR 922; *Re Taylor, Lloyds Bank Ltd v Jones* [1957] 3 All ER 56, [1957] 1 WLR 1043; *Re Hatfeild's Will Trusts* [1958] Ch 469, [1957] 2 All ER 261. See also *Toronto General Trusts Co v Irwin* (1896) 27 OLR 491. As to disclaimer see PARA 442 ante.

5 *D'Eyncourt v Gregory* (1864) 34 Beav 36; *Craven v Brady* (1869) 4 Ch App 296; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL (where a son born after the forfeiture of a life interest by his father nevertheless took an entailed interest at birth), overruling *Re Blathwayt's Will Trusts, Blathwayt v Blathwayt* [1950] 1 All ER 582 (where it was held that acceleration took place in favour of the next successor at the date of forfeiture). As to forfeiture see PARAS 748-751 post.

6 *Fuller v Fuller* (1595) Cro Eliz 422. As to failure of a gift to a former spouse as a result of the dissolution or annulment of the marriage see PARAS 468-469 ante. As to failure of a gift to a former civil partner as a result of the dissolution or annulment of the civil partnership see PARA 470 ante.

7 This rule applies both to real and to personal estate: see the cases cited in notes 2-5 supra. In *Midland Bank Executor and Trustee Co Ltd v IRC* [1959] Ch 277, [1959] 1 All ER 180, CA, there was no acceleration where income which was subject to certain trusts for a limited period was subjected by deed and court order to the same trusts as would arise on the expiration of that period, as new and separate trusts were thereby created; furthermore, an intervening contingent trust for accumulation prevented acceleration. In two settlement cases, *Re Flower's Settlement Trusts, Flower v IRC* [1957] 1 All ER 462, [1957] 1 WLR 401, CA (failure for uncertainty of life interests) and *Re Young's Settlement Trusts, Royal Exchange Assurance v Taylor-Young* [1959] 2 All ER 74, [1959] 1 WLR 457 (surrender of life interests), there was held to be no acceleration of subsequent interests because the settlor had shown a contrary intention.

8 *Re* pursuant to the rule in *Andrews v Partington* (1791) 3 Bro CC 401: see PARA 598 post.

9 *Re Kebty-Fletcher's Will Trusts, Public Trustee v Swan and Snowden* [1969] 1 Ch 339 at 344, [1967] 3 All ER 1076 at 1079 per Stamp J; *Re Harker's Will Trusts, Kean v Harker* [1969] 3 All ER 1 at 5, [1969] 1 WLR 1124 at 1128 per Goff J (not following *Re Davies, Davies v Mackintosh* [1957] 3 All ER 52, [1957] 1 WLR 922, although it had been approved by Upjohn J in *Re Taylor, Lloyds Bank Ltd v Jones* [1957] 3 All ER 56, [1957] 1 WLR 1043).

10 *Re Taylor, Lloyds Bank Ltd v Jones* [1957] 3 All ER 56, [1957] 1 WLR 1043. Cf *Re Dawson's Settlement, Lloyds Bank Ltd v Dawson* [1966] 3 All ER 68, [1966] 1 WLR 1456 (where the contingency of attaining the age of 21 or marriage did not prevent acceleration on the failure of the prior interest).

11 *Lainson v Lainson* (1854) 5 De GM & G 754; *Jull v Jacobs* (1876) 3 ChD 703 at 712; *Re Johnson, Danily v Johnson* (1893) 68 LT 20. See also *Re Flower's Settlement Trusts, Flower v IRC* [1957] 1 All ER 462 at 465, [1957] 1 WLR 401 at 405-406, CA, per Jenkins LJ. Where a series of equitable limitations is meant to be exhaustive, the failure of a prior interest will accelerate those in remainder: *Re Willis, Crossman v Kirkaldy* [1917] 1 Ch 365; *Re Conyngham, Conyngham v Conyngham* [1921] 1 Ch 491, CA; *Re Brooke, Brooke v Dickson* [1923] 2 Ch 265, CA. The rule applies when the subsequent interest is a partial interest such as an annuity: *Re Hodge, Midland Bank Executor and Trustee Co Ltd v Morrison* [1943] Ch 300, [1943] 2 All ER 304 (annuity subject to life interest which was disclaimed). In *Re Crother's Trusts* [1915] 1 IR 53, a gift over on death was construed as taking effect on death or remarriage. As to interests determinable on bankruptcy see *Re Cooper, Townend v Townend* (1917) 86 LJ Ch 507. The will may, however, show an intention to destroy the interest in remainder as well as the life interest: *Re Jerminham Trusts, Gormanstown v Nicholl* [1922] 1 IR 115.

12 *M'Carthy v M'Carthy* (1878) 1 LR Ir 189; *Aplin v Stone* [1904] 1 Ch 543; *Re Scott, Scott v Scott* [1911] 2 Ch 374 (contingent remainder taking effect as an executory limitation under the Contingent Remainders Act 1877); *Kearney v Kearney* [1911] 1 IR 137, Ir CA; *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713. In such cases, therefore, the question of construction arises whether the words introducing the subsequent limitations merely denote the order of succession of the limitations or whether they introduce a new contingency: see *Lainson v Lainson* (1854) 5 De GM & G 754 ('after the death').

13 *Re Townsend's Estate, Townsend v Townsend* (1886) 34 ChD 357 at 360; *Re Vernon, Garland v Shaw* (1906) 95 LT 48 at 54; *Re Cooper, Townsend v Townsend* (1917) 86 LJ Ch 507. See also *Re Love, Green v Tribe* (1878) 47 LJ Ch 783 (where, pending a member of the class of donees under the subsequent gift coming into existence, the intermediate income was held to fall into residue).

14 *Re Scott, Widdows v Friends of the Clergy Corp'n* [1975] 2 All ER 1033, [1975] 1 WLR 1260. Cf *Re Dawson's Settlement, Lloyds Bank Ltd v Dawson* [1966] 3 All ER 68, [1966] 1 WLR 1456; *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446, [1985] 1 All ER 1066, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(8) EFFECT OF FAILURE AND LAPSE/473. Contingent gifts over.

473. Contingent gifts over.

Where a gift is liable to fail on a contingent event¹ and is followed by a gift over, then, on the contingency happening, the prior gift is divested. Where, owing to lapse or some rule of law, the gift over fails to take effect according to its tenor in favour of the donee², the residuary donee or the person entitled on intestacy, as the case may be, takes, but the rule does not apply where the gift over is void for remoteness, the result in such a case being that the prior gift remains absolute³. The entire contingency suspending the vesting of the gift over must occur in such cases⁴. The prior gift is not divested, however, where it is inferred that the testator intended divesting not to take place unless the gift over were effective, or where the gift over is void for uncertainty⁵. Where the contingency on which the prior gift is to fail may happen in two ways, and there is a gift over only if it happens in one way, there is an implied gift over if it happens in the other way, provided that in the circumstances this is in accordance with the testator's intention⁶.

1 The contingency must be such as is allowed by law as a condition precedent to the vesting of the gift over. Thus it must observe the proper limits, otherwise the prior gift is not divested. Although a prior limitation is invalid because it offends against the perpetuities rule, the ultimate trust may be valid if it is not dependent on the earlier limitation: *Re Hay, Leech v Hay* [1932] NI 215; *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225. The doctrine of dependent invalidity

was abolished by the Perpetuities and Accumulations Act 1964 s 6 and, in relation to wills coming into operation on or after 16 July 1964 (see s 15(5)), the ultimate trust cannot be invalidated on the ground of dependent invalidity. See further PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1082, 1084, 1088. As to alternative gifts expressed to have effect where the primary donee predeceases the testator but the primary gift fails for a different reason see PARA 471 text and note 5 ante.

2 *Doe d Blomfield v Eyre* (1848) 5 CB 713 (gift over by way of appointment to non-object of the power); *Robinson v Wood* (1858) 4 Jur NS 625 (void gift over to a charity under former mortmain law); *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 399, 407 (lapse); *Re Richard B Hennessy* (1963) 98 ILTR 39 (gift to A or his issue after life interest, 'if not' to B; A's interest determined on death in lifetime of tenant for life irrespective of whether B took). See also *Hurst v Hurst* (1882) 21 ChD 278 at 293, CA (forfeiture clause independent of gift over); *Re Archer* (1907) 14 OLR 374 (mortmain); *Re Bold, Banks v Hartland* (1926) 95 LJ Ch 201 (death under 21 of donee of gift over). Where a will gave an annuity and directed the appropriation of a fund to meet it, and made a gift over of the fund, then, although the annuitant died before the testatrix so that the gift to the annuitant failed, the gift over was effective: *Re Clarke, Sheldon v Redrup* [1942] Ch 434, [1942] 2 All ER 294.

3 See *Re Brown and Sibley's Contract* (1876) 3 ChD 156; *Re Pratt's Settlement Trusts, McCullum v Phipps-Hornby* [1943] Ch 356, [1943] 2 All ER 458; and POWERS vol 36(2) (Reissue) PARA 356.

4 Where the gift over is to a class not in existence, the coming into existence of the class may be part of the contingency on which the gift over is to take effect, and accordingly, where the other events giving rise to the gift over happen but the class fails to come into existence, the original gift is not divested, the combined contingency not having happened: *Jackson v Noble* (1838) 2 Keen 590 (explained in *Robinson v Wood* (1858) 4 Jur NS 625). Similarly, a gift over, on a contingent event which happens, to the survivor of a number of persons is contingent also on the survivor existing to take the gift, and, if he does not exist, the prior gift is not divested: *Jones v Davies* (1880) 28 WR 455; *Re Deacon's Trusts, Deacon v Deacon, Hagger v Heath* (1906) 95 LT 701.

5 *Re Archer* (1907) 14 OLR 374 at 377 per Riddell J (citing *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 407 per Lord Selborne). See also *Hurst v Hurst* (1882) 21 ChD 278 at 293 per Jessel MR; applied in *Re Rooke, Rooke v Rooke* [1953] Ch 716, sub nom *Re Rooke's Will Trusts, Taylor v Rooke* [1953] 2 All ER 110 (substitutionary gifts to children).

6 *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664, CA; *Re Riggall, Wildash v Riggall* [1949] WN 491 (applying the rule in *Jones v Westcomb* (1711) Prec Ch 316). Cf *Re Graham, Graham v Graham* [1929] 2 Ch 127; *Re Bailey, Barrett v Hyder* [1951] Ch 407, [1951] 1 All ER 391, CA (where no such intention could be attributed to the testator and hence the rule did not apply). The rule does not apply to a gift of an option to purchase to be exercised within a specified time from an event which took place before the testator's death: *Re Hammersley, Foster v Hammersley* [1965] Ch 481, [1965] 2 All ER 24. As to gifts in the alternative see PARAS 471 text and note 5 ante, 611 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(8) EFFECT OF FAILURE AND LAPSE/474. Lapsed devises and bequests.

474. Lapsed devises and bequests.

Where a will contains a residuary devise, then, unless a contrary intention appears, real estate, or an interest in real estate, comprised or intended to be comprised in any specific devise which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of the devise being contrary to law, or which is otherwise incapable of taking effect, is included in the residuary devise¹. If the will contains no residuary devise and a specific devise fails, the devised property passes as on an intestacy². Property included in a residuary devise which lapses also passes as on an intestacy³.

Lapsed bequests of personalty fall into residue and pass under the residuary bequest⁴, or, where there is no residuary bequest, pass as on an intestacy, as does a lapsed residue or share of residue⁵.

1 Wills Act 1837 s 25 (amended by the Statute Law Revision (No 2) Act 1888). See *Greated v Greated* (1859) 26 Beav 621 at 629. Before the enactment of the Wills Act 1837, a residuary devise did not include lapsed specific devises: *Cambridge v Rous* (1802) 8 Ves 12 at 25. Parliament intended by that enactment to assimilate the law as to residuary devises of real estate to that of residuary gifts of personal property, which had long

been held to comprise any legacy which failed by lapse or by being void ab initio: *Carter v Haswell* (1857) 3 Jur NS 788 at 790 per Stuart V-C. In *Mason v Ogden* [1903] AC 1, HL, a residuary gift of freehold was held to be a residuary devise within the statute; a gift of the whole of the testator's realty (including copyholds) was not necessary; he in fact had no copyholds. But, in *Springett v Jennings* (1871) 6 Ch App 333 and *Re Brown* (1855) 1 K & J 522, a gift of particular residue was held not to be enough. As to what passes under a residuary gift see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 531-532; and as to lapse generally see PARA 450 et seq ante.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

3 *Ackroyd v Smithson* (1780) 1 Bro CC 503.

4 *Cambridge v Rous* (1802) 8 Ves 12 at 25. As to residuary bequests see further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 531 et seq; and as to whether lapsed legacies fall into a particular or general residuary gift see PARA 471 ante.

5 *Bagwell v Dry* (1721) 1 P Wms 700; *Page v Page* (1728) 2 P Wms 489; *Sykes v Sykes* (1868) 3 Ch App 301; *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576, [1955] 2 All ER 625.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/2. INCIDENTS AND FAILURE OF GIFTS/(8) EFFECT OF FAILURE AND LAPSE/475. Charge on lapsed property.

475. Charge on lapsed property.

Where property is given or appointed by will to one person charged with an annual or lump sum in favour of another, the charge is not affected by the death of the donee of the property before the testator¹, although it will fail if the gift to the donee is adeemed². If, however, the chargee dies in the testator's lifetime³ or the charge fails⁴, for example for illegality⁵ or because no chargee is identified⁶, the charge as a general rule⁷ sinks for the benefit of the devisee. Similarly, where personal property, including a particular fund⁸, is bequeathed subject to a charge, and the chargee, for example, does not come into existence⁹ or is not identified¹⁰, his interest sinks for the benefit of the legatee. The same principle applies where the object for which the charge was created fails for illegality¹⁰.

A distinction must, however, be drawn between a devise subject to a charge and a devise or bequest with an exception out of it. It is a question of construction of the will in each case. The test is whether the testator meant to give the property minus the thing in question, in which case the thing falls into residue, or that the thing should be a charge on the property, in which case the specific devisee or legatee takes¹¹.

1 *Wigg v Wigg* (1739) 1 Atk 382; *Hills v Wirley* (1743) 2 Atk 605; *Oke v Heath* (1748) 1 Ves Sen 135. See also *Re Kirk, Kirk v Kirk* (1882) 21 ChD 431, CA (where land was devised to a creditor subject to a condition that he should release a debt, and the creditor predeceased the testator).

2 *Cowper v Mantell* (1856) 22 Beav 223.

3 *Sutcliffe v Cole* (1855) 3 Drew 135. See also *A-G v Milner* (1744) 3 Atk 112.

4 *Re Cooper's Trusts, ex p Sparks* (1853) 4 De GM & G 757. See also *Kennell v Abbott* (1799) 4 Ves 802; *Tucker v Kayess* (1858) 4 K & J 339; *King v Denison* (1813) 1 Ves & B 260 at 265. See further the Wills Act 1837 s 25 (as amended); and PARA 474 ante.

5 *Baker v Hall* (1806) 12 Ves 497; *Cooke v Stationers' Co* (1831) 3 My & K 262; *Re Clulow's Trust* (1859) 1 John & H 639. See also *Jackson v Hurlock* (1764) 2 Eden 263; *Wright v Row* (1779) 1 Bro CC 61; *Blight v Hartnoll* (1883) 23 ChD 218 at 222, CA.

6 *Re Mulcair* [1960] IR 321.

7 The testator may manifest an intention that the money charged be raised in any event: see *Tregonwell v Sydenham* (1815) 3 Dow 194 at 211, HL, per Lord Eldon. Most of the cases on this point are cases not of lapse

but of failure, under the former law relating to mortmain, of charges on land in favour of a charity: see *Arnold v Chapman* (1748) 1 Ves Sen 108; *Greavenor v Hallum* (1767) Amb 643; *Bland v Wilkins* (1782) 1 Bro CC 61n. As to the case where the money charged or interest created is not disposed of by the will see *Sidney v Shelley* (1815) 19 Ves 352 (term of years); *Heptinstall v Gott* (1862) 2 John & H 449.

8 *Scott v Salmond* (1833) 1 My & K 363.

9 *Tucker v Kayess* (1858) 4 K & J 339 at 342.

10 *Re Rogerson, Bird v Lee* [1901] 1 Ch 715. See also CHARITIES vol 8 (2010) PARA 61. As to where there is a partial intestacy see further note 7 supra.

11 *Tucker v Kayess* (1858) 4 K & J 339 at 342; *Re Jupp, Gladman v Jupp* (1903) 87 LT 739. See also *Sutcliffe v Cole* (1855) 3 Drew 135; *Heptinstall v Gott* (1862) 2 John & H 449; *Simmons v Pitt* (1873) 8 Ch App 978; *Blight v Hartnoll* (1883) 23 ChD 218 at 222, CA (distinguishing *Wainman v Field* (1854) Kay 507); *Re Tilden, Coubrough v Royal Society of London* (1938) 82 Sol Jo 334.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(1) COURTS OF CONSTRUCTION/476. Functions of the court of construction.

3. CONSTRUCTION OF WILLS

(1) COURTS OF CONSTRUCTION

476. Functions of the court of construction.

In this title the term 'court of construction' is used of any court entertaining, within the scope of its jurisdiction, any question as to the meaning and effect of an instrument of a testamentary nature. The determination of such questions is within the jurisdiction of the High Court and is assigned to the Chancery Division¹ or the county court, in cases where the value of the estate is within the county court limit². The procedure is governed by Part 64 of the Civil Procedure Rules which requires claims to be made by issuing a Part 8 claim form³. The functions of a court of probate and a court of construction are distinct⁴. In the exercise of its administrative jurisdiction the court may authorise personal representatives to act on the basis of counsel's opinion on a matter of construction⁵.

1 See the Supreme Court Act 1981 s 61(1), Sch 1 para 1(d); and CPR 64.1(3). See generally COURTS vol 10 (Reissue) PARA 611 et seq; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 705 et seq. As to the Civil Procedure Rules generally see CIVIL PROCEDURE.

2 See the County Courts Act 1984 s 23(a); and COURTS vol 10 (Reissue) PARA 719. The county court limit is currently £30,000: see the County Courts Jurisdiction Order 1981, SI 1981/1123 (as amended); the High Court and County Courts Jurisdiction Order 1991, SI 1991/724 (as amended); and COURTS vol 10 (Reissue) PARA 710.

3 CPR 64.3. For the meaning of a 'Part 8 claim form' see CIVIL PROCEDURE vol 11 (2009) PARA 130. As to issuing a Part 8 claim form see CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq. As to costs see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 746 et seq; TRUSTS vol 48 (2007 Reissue) PARA 907 et seq.

4 As to the function of the probate court see PARA 306 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 75. As to the separation of the functions of the probate court and a court of construction see *Townsend v Moore* [1905] P 66 at 84, 86, 88, CA; *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, [1967] 3 All ER 915 at 925, PC (citing Sir John Nicholl in *Methuen v Methuen* (1817) 2 Phillim 416 at 426 and *Greenough v Martin* (1824) 2 Add 239 at 243). See, however, *Re Finmore* [1992] 1 All ER 800, [1991] 1 WLR 793 (where, before the grant of probate, the question whether a later will revoked an earlier will was determined in construction proceedings rather than in a probate action).

5 See the Administration of Justice Act 1985 s 48 (as amended); and PARA 480 post.

UPDATE

476 Functions of the court of construction

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(1) COURTS OF CONSTRUCTION/477. Jurisdiction to correct mistake.

477. Jurisdiction to correct mistake.

A mistake in the will of a testator who died before 1 January 1983¹, such as an error in a name or description, or in the insertion or omission of any words, whether by the testator or his draftsman, may be corrected by the court of construction², but only on inferences obtained from the whole will, and not on any extrinsic evidence³ other than such evidence of the material circumstances as is admissible in construing the will⁴.

In relation to such wills the court has no jurisdiction to alter the probate⁵, and must be satisfied on the construction of the will alone⁶ that there is a mistake or omission in the will; whenever the matter is merely doubtful, the court must adhere to the words of the will⁷.

1 le the date on which the Administration of Justice Act 1982 s 20 (rectification of wills: see PARA 408 ante) came into force: see s 76(11). Nothing in s 20 affects the will of a testator who died before that date: s 73(6)(c).

2 *Dent v Pepys* (1822) 6 Madd 350; *Re Boehm* [1891] P 247 (cited in *Re Baynham*, *Hart v Mackenzie* (1891) 7 TLR 587). As to the rules of construction in relation to the alteration of the words of a will see PARA 544 post.

3 *Shergold v Boone* (1807) 13 Ves 370 at 376; *Earl Newburgh v Countess Dowager Newburgh* (1820) 5 Madd 364; Sugden's Law of Property 196, 367; *Miller v Travers* (1832) 8 Bing 244; *Langston v Langston* (1834) 2 Cl & Fin 194 at 238, HL; *Re Chenoweth*, *Ward v Dwelley* (1901) 17 TLR 515. See also PARA 495 post. As to the admission of extrinsic evidence in the probate court see PARA 306 ante; and as to the rules of construction in such a case see PARAS 560-561 post.

4 *Bradshaw v Bradshaw* (1836) 2 Y & C Ex 72.

5 *Taylor v Creagh* (1858) 8 I Ch R 281 at 287. Any correction of such a will must be done by the probate court (*Re Bywater*, *Bywater v Clarke* (1881) 18 ChD 17 at 22, CA; *Re Carlisle*, *Belfast Bank Executor and Trustee Co v Patterson* [1950] NI 105 at 112-113), except where the correction can be made as a matter of construction of the will taken as a whole. As to the exclusion of part of a will from probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 301. As to omitting from the probate words introduced in the will by mistake see *Re Boehm* [1891] P 247; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 139. As to revoking a probate containing a mistake see *Brisco v Baillie and Hamilton* [1902] P 234.

6 In certain circumstances the court may look at the original will to explain, but not to contradict, the probate copy: see *Oppenheim v Henry* (1853) 9 Hare 803n; and PARA 488 post.

7 *Mellish v Mellish* (1798) 4 Ves 45 at 50; *Philipps v Chamberlaine* (1798) 4 Ves 51 at 57; *Thompson v Whitelock* (1859) 4 De G & J 490 at 500-501. As to the character which the context of a will must bear in order to show mistake see *Morgan v Thomas* (1882) 9 QBD 643 at 645-646, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(1) COURTS OF CONSTRUCTION/478. Attempts to oust the court's jurisdiction.

478. Attempts to oust the court's jurisdiction.

The jurisdiction of the court in the construction of a will is not ousted by the fact that the will is in a foreign language, or has to be construed by foreign rules of construction¹, nor by any direction or recommendation by the testator that questions of construction are to be decided in a different manner, for example by the trustees or executors, or by arbitration². A direction that a beneficiary resorting to litigation for this purpose is to forfeit his interest is inoperative, so far as it prevents him from seeking the aid of the court³.

A condition that a beneficiary is not to dispute the validity of the will⁴ or of any other instrument⁵, or to interfere with the management of the testator's estate, and on breach of the condition is wholly or partially to forfeit his gift, may, however, be valid and operative for the purpose of causing a forfeiture on litigation by the donee⁶. Such a condition is not, however, construed prima facie to extend to cases where there is a reasonable cause for litigation⁷, or to defending proceedings taken by persons other than the donee⁸, and, if it is couched in language which prevents the donee from resorting to any proceedings whatever concerning his gift, even to secure its enjoyment⁹, or if in the case of gifts of personal estate¹⁰ it is merely imposed in terrorem¹¹ on the legatee, it is repugnant to the gift and void.

1 *Duchess di Sora v Phillipps* (1863) 10 HL Cas 624 at 636, 639-640 per Lord Chelmsford; *Re Bonnefoi, Surrey v Perrin* [1912] P 233, CA. Cf CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 452-455.

2 *Massy v Rogers* (1883) 11 LR Ir 409; *Re Walton's Estate* (1856) 8 De GM & G 173; *Re Raven, Spencer v National Association for the Prevention of Consumption and Other Forms of Tuberculosis* [1915] 1 Ch 673 (where a direction that any doubt as to the identity of a legatee should be decided by the trustees, whose decision should be final, was held contrary to public policy and void for repugnancy); *Re Wynn, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341 (where a provision that the trustees should determine matters of doubt was held void for repugnancy and as being contrary to public policy). See also *Philips v Bury* (1694) Skin 447 at 469 per Eyre J. Acts done in good faith, under a determination by the tribunal set up by the testator, are valid, it appears, not only to protect the executors or trustees but for all purposes: *Re Thompson's Will, Brahe v Mason* [1910] VLR 251 at 255.

3 *Rhodes v Muswell Hill Land Co* (1861) 30 LJ Ch 509 at 511; *Massy v Rogers* (1883) 11 LR Ir 409. The persons claiming under the testator may agree on arbitration: see *Ridout v Pain* (1747) 3 Atk 486. As to the stay of proceedings after such a submission to arbitration cf ARBITRATION vol 2 (2008) PARA 1222 et seq.

4 *Boughton v Boughton* (1750) 2 Ves Sen 12; *Cooke v Turner* (1846) 15 M & W 727. See also *Re Ogilvie, Ogilvie v Ogilvie* [1918] 1 Ch 492 at 496.

5 *Violett v Brookman* (1857) 26 LJ Ch 308.

6 *Adams v Adams* [1892] 1 Ch 369, CA (frivolous actions). See also *Re Allan, Havelock v Havelock-Allan* (1896) 12 TLR 299 (proceedings in Parliament); and TRUSTS vol 48 (2007 Reissue) PARA 1070. A donee having a vested interest does not dispute a will merely by claiming payment of a legacy the income of which is directed to be accumulated, in respect of which he is entitled to give a discharge and put an end to the accumulation: *Phillips v Phillips* [1877] WN 260.

7 *Powell v Morgan* (1688) 2 Vern 90; *Adams v Adams* [1892] 1 Ch 369 at 375, CA, per Lopes LJ, and at 377 per Kay LJ; *Re Williams, Williams v Williams* [1912] 1 Ch 399 at 401. See also *Nutt v Burrell* (1724) Cas temp King 1 (frivolous action, but no forfeiture); *Wallace v Wallace* (1898) 24 VLR 859; *Harrison v Harrison* (1904) 7 OLR 297.

8 *Cooke v Cholmondeley* (1849) 2 Mac & G 18 at 28; *Warbrick v Varley (No 2)* (1861) 30 Beav 347; *Wilkinson v Dyson* (1862) 10 WR 681; *Massy v Rogers* (1883) 11 LR Ir 409 at 421.

9 *Rhodes v Muswell Hill Land Co* (1861) 29 Beav 560 at 563; *Re Williams, Williams v Williams* [1912] 1 Ch 399.

10 The rule does not apply to devises of real estate, or legacies charged on real estate: see PARA 425 ante.

11 Eg where there is no gift over on forfeiture: *Morris v Burroughs* (1737) 1 Atk 399 at 404. A gift over, or direction that the gift is to fall into residue, on breach of the condition, prevents such a construction: *Cleaver v Spurling* (1729) 2 P Wms 526 at 528; *Warbrick v Varley (No 2)* (1861) 30 Beav 347 at 350; *Stevenson v Abington* (1863) 11 WR 935. As to conditions in terrorem see PARA 425 et seq ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(1) COURTS OF CONSTRUCTION/479. Duty to construe.

479. Duty to construe.

In an ordinary case, where the rights under a will are in dispute and a meaning can be attached to the words, the court is under a duty not to decline the jurisdiction to declare the meaning of the will, subject to the qualification that it is a matter of discretion for the court whether it should answer a question arising on a contingency which has not yet happened¹. Normally the court will not do so unless some good cause is shown, such as the reasonable desire on the part of some beneficiary to know the limitations of some will or codicil under which he may be interested. The court will not answer a contingent question unless it has before it a representation of every interest which may in any event be affected².

1 *Crofts v Beamish* [1905] 2 IR 349 at 362-363, Ir CA. See also *Ashby v White* (1703) 2 Ld Raym 938 at 956 per Holt CJ; *Dormer v Phillips* (1855) 4 De GM & G 855 at 859.

2 As to who can be made a party to a claim see CPR 64.4.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(1) COURTS OF CONSTRUCTION/480. Construction of wills; reliance on counsel's opinion.

480. Construction of wills; reliance on counsel's opinion.

Where:

- 43 (1) any question of construction has arisen out of the terms of a will¹; and
- 44 (2) an opinion in writing given by a person who has a ten-year High Court qualification² ('the qualified person') has been obtained on that question by the personal representatives under the will,

the High Court may, on the application of the personal representatives and without hearing argument, make an order authorising those persons to take such steps in reliance on that opinion as are specified in the order³.

The application is by way of Part 8 claim form⁴ which must be supported by a witness statement or affidavit to which must be exhibited copies of all documents, instructions to a qualified person, the qualified person's opinion and draft minutes of the desired order⁵. The affidavit (or the exhibits to it) must state:

- 45 (a) the names of all persons who are, or may be, affected by the order sought;
- 46 (b) all surrounding circumstances admissible and relevant in construing the document;
- 47 (c) the date of qualification of the qualified person and his experience in the construction of trust documents;
- 48 (d) the approximate value of the fund or property in question;
- 49 (e) whether it is known to the applicant that a dispute exists and, if so, details of such dispute⁶.

At the first hearing of the claim, if the evidence is complete, the master will send the file to the judge⁷. The judge will consider the papers and, if necessary, direct service of notices⁸ or request such further information as he may desire⁹. If the judge is satisfied that the order sought is appropriate, the order will be made and sent to the applicant¹⁰.

The High Court must not, however, make such an order if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument¹¹. Thus if any acknowledgment of service is received, the applicant must apply to the master (on notice to the parties who have so acknowledged) for directions¹¹. If the applicant desires to pursue the application to the court, in the ordinary case the master will direct that the case proceeds as a Part 8 claim¹². If, on the hearing of the claim, the judge is of the opinion that any party who has entered an acknowledgment of service has no reasonably tenable argument contrary to the qualified person's opinion, in the exercise of his discretion he may order such party to pay any costs thrown away, or part of them¹³.

If the judge makes an order without a hearing, an order does not determine the rights of the beneficiaries but merely absolves the personal representatives from liability as a result of acting on the authorised basis¹⁴.

1 For these purposes, 'will' includes a nuncupative will and any testamentary document of which probate may be granted: Administration of Justice Act 1985 s 56. For the meaning of 'nuncupative' see PARA 373 text to note 1 ante.

2 Ie within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended): see LEGAL PROFESSIONS vol 65 (2008) PARA 742 et seq. See also COURTS.

3 Administration of Justice Act 1985 s 48(1) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 63).

4 Ie under CPR 64.2(d), 64.3. As to the Civil Procedure Rules generally see CIVIL PROCEDURE. As to issuing a Part 8 claim form see CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq.

5 *Chancery Guide* (2002 Edn) PARA 26.37; and see *The Civil Court Practice*.

6 *Chancery Guide* (2002 Edn) PARA 26.38; and see *The Civil Court Practice*.

7 *Chancery Guide* (2002 Edn) PARA 26.39; and see *The Civil Court Practice*. In the Chancery Division masters and district judges cannot without the consent of the Vice-Chancellor make final orders on applications under the Administration of Justice Act 1985 s 48(1) (as amended) (see the text and note 3 supra): see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5(1)(i).

8 *Chancery Guide* (2002 Edn) PARA 26.40; and see *The Civil Court Practice*. See also CPR 19.8A.

9 *Chancery Guide* (2002 Edn) PARA 26.40; and see *The Civil Court Practice*.

10 *Chancery Guide* (2002 Edn) PARA 26.40; and see *The Civil Court Practice*.

11 Administration of Justice Act 1985 s 48(2).

12 *Chancery Guide* (2002 Edn) PARA 26.41; and see *The Civil Court Practice*.

13 *Chancery Guide* (2002 Edn) PARA 26.42; and see *The Civil Court Practice*.

14 Cf *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 524.

(2) ADMISSIBILITY OF EVIDENCE

(i) In general

481. General rule.

In a court of construction¹ the primary evidence of the testator's intentions is the will itself², properly authenticated, and any codicil to it³. For the purpose of construing a codicil, the court may look at the original will or any other codicil to it, and, similarly, the court may look at a codicil for the purpose of construing the original will⁴. The court may look at a recital of a will contained in a codicil and may construe the will by reference to this recital⁵, unless it is obviously erroneous⁶. In order that the will may be properly expounded, the court adopts the general rule that any evidence of the circumstances is admissible which in its nature and effect simply explains what the testator has written⁷, but in general⁸ no evidence may be admitted which in its nature or effect is applicable to the purpose of showing merely what he intended to have written⁹. Extrinsic evidence may be resorted to for the purpose of proving a fact which makes intelligible something in the will which, without the aid of such evidence, would not be intelligible¹⁰.

1 As to a court of construction see PARA 476 et seq ante. See also PARA 306 ante. As to testamentary instruments entitled to probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 103, 123. As to probate in common form see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 124 et seq; and as to probate in solemn form see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 269 et seq. There is a distinction, in the matter of evidence, between an inquiry into the meaning of a will and an inquiry into the existence of such a document or an inquiry to what extent it represents the testamentary intentions of the deceased: *Reffell v Reffell* (1866) LR 1 P & D 139 at 141 (explaining *Guardhouse v Blackburn* (1866) LR 1 P & D 109 at 114). See also *Re Hawksley's Settlements*, *Black v Tidy* [1934] Ch 384; *Re Resch's Will Trusts*, *Le Cras v Perpetual Trustee Co Ltd*, *Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, [1967] 3 All ER 915 at 925, PC (citing Sir John Nicholl in *Methuen v Methuen* (1817) 2 Phillim 416 at 426 and *Greenough v Martin* (1824) 2 Add 239 at 243). As to rectification of the will see PARA 408 ante.

As to the construction of wills containing a foreign element see CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 452-455.

2 The court may also look at the original will in order to explain, but not to contradict, the probate copy: see PARA 488 post.

3 See PARA 512 et seq post.

4 *Hartley v Tribber* (1853) 16 Beav 510 at 515; *Re Townley*, *Townley v Townley* (1884) 50 LT 394 at 396; and see PARA 513 post.

5 *Re Venn*, *Lindon v Ingram* [1904] 2 Ch 52 at 55 (following *Darley v Martin* (1853) 13 CB 683). See also *Grover v Raper* (1856) 5 WR 134.

6 *Skerratt v Oakley* (1798) 7 Term Rep 492. See also *Bamfield v Popham* (1703) 1 P Wms 54; *Re Smith* (1862) 2 John & H 594; *Re Arnold's Estate* (1863) 33 Beav 163 at 171.

7 *Hampshire v Peirce* (1751) 2 Ves Sen 216 at 217, as qualified by *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 371.

8 As to exceptions see PARAS 483, 487, 506-507, 554 post.

9 See Wigram's Extrinsic Evidence, pl 9 (4th Edn) pp 7-8, cited with approval in *Re Mayo*, *Chester v Keirl* [1901] 1 Ch 404 at 405-406 per Farwell J. For a discussion of the admissibility of extrinsic evidence of the surrounding circumstances see *Re Hodgson*, *Nowell v Flannery* [1936] Ch 203. But see PARA 512 post.

10 *Clementson v Gandy* (1836) 1 Keen 309 at 316; *Re Glassington*, *Glassington v Follett* [1906] 2 Ch 305 at 314 per Joyce J (explaining *Higgins v Dawson* [1902] AC 1, HL). As to the admissibility of extrinsic evidence of intention see PARAS 483, 506-507 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/482. Difficulties of construction.

482. Difficulties of construction.

The court construes the whole will in the light of the knowledge of the meaning of the words and expressions used and of the identity of the persons and things described by the will, and of the nature of the facts and circumstances there mentioned, which has been obtained by the admission of evidence of the material circumstances¹. Evidence is not, however, admitted to enable the court to construe a will where the words themselves require no interpretation but the difficulty is only in the construction of the sentence in which the words occur². Where, therefore, the matter in doubt does not relate to the persons and things described by the will, then, even though it can be shown by evidence that the testator's intention was different from that shown by the language of the will, the language of the will, if clear, must settle the rights of the parties³.

Events which might possibly have happened after the date of the will are to be considered, as well as those which did happen⁴. The ascertainment of the testator's intention shown by the will cannot, however, be varied according to the actual course of subsequent events⁵.

Where a will contains an executory trust, that is, where the testator has left it to the court to make out from general expressions what his intention is and has not defined his intention by means of precise limitations⁶, the court is not confined to the language of the will itself in order to discover his intention; it may refer not only to the motives which led to the will and to its general objects and purpose, to be collected from other instruments to which the will itself refers, but also to any circumstances which may have influenced the mind of the testator towards the provisions it contains⁷.

1 See PARA 512 post. Thus a gift 'to A or B', where A and B represent persons ascertained by description, cannot be construed until it is known who A and B respectively are, and in what relation, if any, the persons represented by B stand to those represented by A, so as to be able to supply what is the contingency to be understood as involved in the word 'or': *Re Roberts, Percival v Roberts* [1903] 2 Ch 200 at 203 per Joyce J. See also *Re Sibley's Trusts* (1877) 5 ChD 494 at 499. As to gifts expressed in the alternative see PARA 611 post.

2 *Higgins v Dawson* [1902] AC 1 at 10-11, HL, per Lord Davey. Thus evidence is not admitted to prove to which of two antecedents a given relative pronoun was intended to refer (*Castledon v Turner* (1745) 3 Atk 257), or to rebut a presumption which arises from the construction of words simply according to their meaning as words (*Coote v Boyd, Coote v Coote* (1789) 2 Bro CC 521 at 526 per Lord Thurlow LC). The law as stated in the text would not appear to have been changed by the Administration of Justice Act 1982 s 21: see PARA 483 post.

3 *Higgins v Dawson* [1902] AC 1 at 8, HL, per Lord Shand, and at 9-10 per Lord Davey. See also *Merchant Taylors' Co v A-G* (1871) 6 Ch App 512 at 519.

4 *Boreham v Bignall* (1850) 8 Hare 131 at 137; *Grey v Pearson* (1857) 6 HL Cas 61 at 109 per Lord Wensleydale; *Harding v Nott* (1857) 7 E & B 650 at 657-658.

5 *Re Clark's Trusts* (1863) 32 LJ Ch 525 at 529 per Wood V-C.

6 See *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 210 per Lord St Leonards. As to executory trusts see TRUSTS vol 48 (2007 Reissue) PARAS 669-671.

7 *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 at 561 per Lord Chelmsford. As to the principle that an executory trust is construed so as best to give effect to the apparent intention of the disposer rather than according to the legal effect of the language used see *Leonard v Earl of Sussex* (1705) 2 Vern 526; and TRUSTS vol 48 (2007 Reissue) PARA 669.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/483. Meaningless or ambiguous language.

483. Meaningless or ambiguous language.

In relation to the will of a testator who died before 1 January 1983¹, where the words of the will, aided by evidence of the material facts of the case, or, in the case of a latent ambiguity in the description of some person or thing, evidence of the testator's intention², are insufficient to determine his meaning, the gift in question is void for uncertainty³. Where, however, the testator died on or after that date, then, in so far as any part of the will is meaningless, extrinsic evidence, including evidence of the testator's intention, may be admitted in all cases to assist in its interpretation⁴.

Where the meaning of the will of a testator who died before 1 January 1983 is ambiguous⁵, then, for the purpose of construction, the court generally resorts to the surrounding circumstances as a help in ascertaining the meaning, and places itself in the testator's position, in order to avoid attributing to him a capricious or unreasonable intention⁶. If the evidence of surrounding circumstances discloses an ambiguity, extrinsic evidence of intention is admissible⁷, but, where the ambiguity appears on the face of the instrument, no such evidence is admissible⁸. Where, however, the testator died on or after 1 January 1983, then, in so far as the language used in any part of the will is ambiguous on the face of it, or, in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances, extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation⁹.

1 The date on which the Administration of Justice Act 1982 s 21 (see the text to notes 4-9 infra) came into force: see s 76(11). Nothing in s 21 affects the will of any testator who died before that date: s 73(6)(c).

2 As to the rules formerly governing the admissibility of evidence of intention in cases of latent ambiguity see PARA 506 post.

3 Wigram's Extrinsic Evidence (5th Edn) p 91, Proposition VI.

4 Administration of Justice Act 1982 s 21(1)(a), (2).

5 The meaning of a will is not ambiguous by reason only of difficulties of construction (*Higgins v Dawson* [1902] AC 1 at 10, HL, per Lord Davey); but see PARA 508 note 11 post.

6 *Belaney v Belaney* (1867) 2 Ch App 138 at 142; *Hensman v Fryer* (1867) 3 Ch App 420 at 424. See also *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876; *Gordon v Gordon* (1871) LR 5 HL 254 at 273. In *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 429, 431 and in *Leslie v Earl of Rothes* [1894] 2 Ch 499 at 514, CA, this principle was applied in construing a shifting clause. See also PARA 479 post. As to the presumption in ambiguous cases see PARA 550 post.

7 See note 2 supra.

8 As to the distinction between latent and patent ambiguity see PARA 508 post.

9 See the Administration of Justice Act 1982 s 21(1)(b), (c), (2); and PARAS 507-508 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/484. Usage of persons acting under a will.

484. Usage of persons acting under a will.

Although, as a general rule, the interpretations put on a will by those claiming under it are irrelevant¹, in the case of ancient wills the court may consider the usage of persons acting under the will as explaining its terms, on the ground that it is to be presumed that persons who were concerned have not been committing a breach of trust from the commencement of the trusts to the present time². This is, however, done only in cases where the meaning is doubtful³.

1 As to the effect of mistake on the construction of wills see MISTAKE vol 77 (2010) PARA 36.

2 *A-G v Sidney Sussex College* (1869) 4 Ch App 722 at 732 per Lord Hatherley LC. As to this rule in the case of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 195; and as to this rule in the case of gifts to charities see CHARITIES vol 8 (2010) PARAS 110-112.

3 *A-G v Rochester Corpn* (1854) 5 De GM & G 797 at 822.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/485. Evidence relating to certain presumptions.

485. Evidence relating to certain presumptions.

Where according to equitable doctrines a presumption or an inference from the facts of the case is raised¹, as in the case of the presumptions against double portions², or with respect to satisfaction of portions by legacies and of legacies by portions³, extrinsic evidence is admissible to rebut the presumption, and counter-evidence is then admissible to support it⁴. Evidence in support of the presumption is not, however, admissible unless evidence to rebut it has first been admitted; nor is any evidence admissible to raise a presumption not raised by law⁵. Where, however, the presumption simply arises from the construction of the words of the will, no evidence may be admitted to support or rebut it⁶. Evidence, where admitted, is allowed, not to alter the will or prove the testamentary intention, but to prove some personal obligation on the part of the donee binding on his conscience⁷, or to explain acts and events taking place outside the will⁸.

Evidence is admissible to rebut, or to support when rebutted, resulting or constructive trusts⁹, and, in relation to deaths before 1 January 1926, was admissible in respect of the claims of an executor to a residue undisposed of as against the Crown but not as against the next of kin¹⁰.

1 The presumption must arise out of the facts of the case and not out of the words of the will: see note 6 *infra*.

2 See EQUITY vol 16(2) (Reissue) PARAS 739-748.

3 See EQUITY vol 16(2) (Reissue) PARAS 740-742.

4 *Trimmer v Bayne* (1802) 7 Ves 508; *Hurst v Beach* (1821) 5 Madd 351 at 500 per Leach V-C; *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363 at 373, CA, per James LJ and Brett LJ. See also EQUITY vol 16(2) (Reissue) PARA 751.

5 *Re Tussaud's Estate, Tussaud v Tussaud* (1878) 9 ChD 363 at 373, CA, per James LJ.

6 *Coote v Boyd, Coote v Coote* (1789) 2 Bro CC 521 at 527 per Lord Thurlow LC; *Hurst v Beach* (1821) 5 Madd 351 at 360-361 per Leach V-C. Thus the question whether legacies are cumulative or substitutional is a question of construction merely, and no evidence is admissible: *Hall v Hill* (1841) 1 Dr & War 94; *Wilson v O'Leary* (1872) 7 Ch App 448 at 456, CA. Such evidence would amount to a contradiction or amplification of the words of the will, and no evidence for this purpose is admissible: *Lee v Pain* (1844) 4 Hare 201 at 216; and see PARA 490 post. In *Hubbard v Alexander* (1876) 3 ChD 738, however, evidence was admitted to show the duplicate nature of the instruments, but it is doubtful whether this evidence was properly admitted: see PARA 488 note 2 post.

7 *Re Shields, Corbould-Ellis v Dales* [1912] 1 Ch 591 at 599-600 (explaining *Hall v Hill* (1841) 1 Dr & War 94 and *Kirk v Eddowes* (1844) 3 Hare 509 at 516, 520; and following *Fowkes v Pascoe* (1875) 10 Ch App 343 at 350, CA, per James LJ). As to evidence of personal obligations of the donee see PARA 509 post.

8 *Hall v Hill* (1841) 1 Dr & War 94 at 117.

9 See *Cook v Hutchinson* (1836) 1 Keen 42 at 50 per Lord Langdale MR; and TRUSTS vol 48 (2007 Reissue) PARA 707.

10 See *Williams v Arkle* (1875) LR 7 HL 606; *Re Bacon's Will, Camp v Coe* (1886) 31 ChD 460.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/486. Evidence as to gift to executor.

486. Evidence as to gift to executor.

Where a testator has expressed, outside his will, the intention of releasing a debt owed to him by, or making a gift of personal estate to, a person who on his death becomes his executor¹, the court admits extrinsic evidence of the intention².

1 This rule was extended to the case of an administrator in *Re James, James v James* [1935] Ch 449, but that decision was doubted in *Re Gonin* [1979] Ch 16 at 35, [1977] 2 All ER 720 at 734 per Walton J.

2 *Strong v Bird* (1874) LR 18 Eq 315; *Re Applebee, Leveson v Beales* [1891] 3 Ch 422; *Re Pink, Pink v Pink* [1912] 2 Ch 528, CA; *Re Goff, Featherstonehaugh v Murphy* (1914) 111 LT 34. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 21.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(i) In general/487. Character of evidence.

487. Character of evidence.

The instructions of a testator who died before 1 January 1983 for the preparation of his will may not be given in evidence to prove his intentions¹, except in the cases where evidence of intention is admissible². With regard to such a testator, similar considerations apply to revoked wills³, a draft of the will⁴, letters⁵ and to papers or sayings of his⁶. As a general rule⁷, documents other than the will may not be referred to for the purpose of the construction of the will⁸ unless they are expressly referred to in the will⁹.

However, in the case of a testator who died on or after 1 January 1983¹⁰, a will which fails to carry out his intentions in consequence of a failure to understand his instructions may be rectified¹¹, and extrinsic evidence of the testator's intention, which has always been admissible in cases of latent ambiguity¹², may also be admitted to assist in interpreting any part of a will which is meaningless or ambiguous on its face¹³.

1 *Towers v Moor* (1689) 2 Vern 98; *Doe d Hubbard v Hubbard* (1850) 15 QB 227; *Drake v Drake* (1860) 8 HL Cas 172.

2 *Re Hubbuck* [1905] P 129 at 135; *Re Bateman, Wallace v Mawdsley* (1911) 27 TLR 313 (where such evidence was excluded). However, in *Re Ofner, Samuel v Ofner* [1909] 1 Ch 60, CA, such evidence was admitted as evidence identifying the donee and not as evidence of intention. As to latent ambiguity see PARAS 506-508 post.

3 *Richardson v Watson* (1833) 4 B & Ad 787; *Re Feltham's Will Trusts* (1855) 1 K & J 528 at 532; *Re Waller, White v Scoles* (1899) 80 LT 701, CA; *Re Smith, Smith v Johnson* (1904) 20 TLR 287; *Re Nesbitt's Will Trusts, Dr Barnardo's Homes National Incorp Association v United Newcastle-Upon-Tyne Hospitals of the Board of Governors* [1953] 1 All ER 936, [1953] 1 WLR 595; *Re Tetsall, Foyster v Tetsall* [1961] 2 All ER 801, [1961] 1 WLR 938 (where a revoked will was looked at to identify the subject matter of the gift). A provision which is clearly revoked, even though admitted to probate, may not be resorted to as expressing the intention of the testator for any purpose: *Choa Eng Wan v Choa Giang Tee* [1923] AC 469, PC. Cf *Re Northcliffe, Arnholz v Hudson* [1925] Ch 651 at 654 (cited in PARA 302 note 9 ante).

4 *Miller v Travers* (1832) 8 Bing 244; *Bradshaw v Bradshaw* (1836) 2 Y & C Ex 72.

5 *Bernasconi v Atkinson* (1853) 10 Hare 345 at 354.

6 *Bertie v Falkland* (1798) 1 Salk 231 (papers etc). See also *Sir Lytton Strode v Lady Falkland* (1707) 3 Rep Ch 169; *Bennet v Davis* (1725) 2 P Wms 316 at 318; *Herbert v Reid* (1810) 16 Ves 481 at 490; *Duke of Leeds v Earl of Amherst* (1844) 9 Jur 359; *British Home and Hospital for Incurables v Royal Hospital for Incurables* (1904) 90 LT 601, CA; *Re Brady, Wylie v Ratcliff* (1919) 147 LT Jo 235.

7 See, however, PARA 503 post.

8 *Hughes v Turner* (1835) 3 My & K 666 at 697-698 (revoked will); *Randall v Daniel* (1857) 24 Beav 193 at 206. Cf *Doe d Brown v Brown* (1809) 11 East 441; *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355, HL.

9 See PARA 489 post.

10 The date on which the Administration of Justice Act 1982 s 20 (rectification) and s 21 (evidence) came into force: see s 76(11). Nothing in ss 20, 21 affects the will of a testator who died before that date: s 73(6) (c).

11 See *ibid* s 20; and PARA 408 ante.

12 This rule is now given statutory force by *ibid* s 21(1)(c), (2): see PARA 507 post.

13 See *ibid* s 21(1)(a), (b), (2); and PARAS 483 ante, 507 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/488. Conclusiveness of probate.

(ii) Evidence of Language and its Meaning

488. Conclusiveness of probate.

For the purpose of discovering what words the testator used, and what dispositions he made, the court of construction accepts the probate, in the case of all English wills, as conclusively showing the state in which the will was at its execution¹, and containing the whole will to be construed². The court may look at the original will³ in order to settle questions arising on the punctuation⁴, or on the introduction of a capital letter or other mark which may indicate where a sentence or clause was intended to begin and which may affect its sense, or on the effect of blanks in the will, and generally in order to see whether any light is thrown on the construction of the will by its form⁵. The court may take into account, as assisting the construction, the fact that the will was made on a printed form⁶; but, while the court may look at the original will for the purpose of assisting the construction of the probate copy, it may not do so for the purpose of contradicting it⁷.

Where under the present practice a photographic copy of the will is annexed to the probate⁸, this in effect is equivalent to the original will.

1 *Bernal v Bernal* (1838) 3 My & Cr 559 at 563n. See also *Lynn v Beaver* (1823) Turn & R 63 at 67 per Lord Eldon LC; *Wordsworth v Wood* (1847) 1 HL Cas 129 at 157n; *Oppenheim v Henry* (1853) 9 Hare 803n; *Gann v Gregory* (1854) 3 De GM & G 777 at 781 (crossed lines over part of will, and pencil alterations); *Barnaby v Tassell* (1871) LR 11 Eq 363 at 368; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 68, 71; but see the text and note 7 infra. As to the omission from the probate of passages and expressions of a malicious or libellous character see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 139; and as to the omission of passages inserted by mistake see PARA 477 ante.

2 As to the reception of a probate in evidence see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 71. In *Hubbard v Alexander* (1876) 3 ChD 738, a court of construction admitted evidence to show that two codicils were not two distinct instruments, but not for the purpose of construing them in order to determine whether they were cumulative in effect. It appears that this evidence was wrongly admitted. Such evidence is admissible in the probate court: *Jenner v Finch* (1879) 5 PD 106.

3 *Re Harrison, Turner v Hellard* (1885) 30 ChD 390 at 393, CA, per Lord Esher MR, and at 394 per Baggallay LJ. The court may look at the original will, even where the probate is in facsimile form: *Shea v Boschetti* (1854) 18 Beav 321. In the case of foreign wills, the court may look at the original, even though only an English translation has been proved: *Re Cliff's Trusts* [1892] 2 Ch 229.

4 *Houston v Burns* [1918] AC 337 at 342, HL, per Lord Finlay; *Re Steel, Public Trustee v Christian Aid Society* [1979] Ch 218, [1978] 2 All ER 1026.

5 *Child v Elsworth* (1852) 2 De GM & G 679 at 683; *Oppenheim v Henry* (1853) 9 Hare 803n per Wood V-C. See also *Philipps v Chamberlaine* (1798) 4 Ves 51 at 57; *Thellusson v Woodford* (1799) 4 Ves 227 at 325 (parenthesis); *Lunn v Osborne* (1834) 7 Sim 56 at 61; *Compton v Bloxham* (1845) 2 Coll 201; *Milsome v Long* (1857) 3 Jur NS 1073 (where the court looked at the will, which confirmed the view based on the probate); *Thompson v Whitelock* (1859) 4 De G & J 490; *Re Baynham, Hart v Mackenzie* (1891) 7 TLR 587; *Munro v Henderson* [1907] 1 IR 440 at 443 (affd [1908] 1 IR 260, Ir CA); *Re Jeffrey, Welch v Jeffrey* [1948] 2 All ER 131. For cases where the court considered the effect of erasures in the original will see *Manning v Purcell* (1855) 7 De GM & G 55 at 66; *Re Battie-Wrightson, Cecil v Battie-Wrightson* [1920] 2 Ch 330.

6 *Re Harrison, Turner v Hellard* (1885) 30 ChD 390, CA; *Re Stevens, Pateman v James* [1952] Ch 323, [1952] 1 All ER 674. There is no rule that, in the case of inconsistency between the words of the printed form and those in the testator's own handwriting, the handwritten words must prevail: *Re Gare, Filmer v Carter* [1952] Ch 80, [1951] 2 All ER 863.

7 *Oppenheim v Henry* (1853) 9 Hare 803n. If, however, none of the parties objects and an inaccuracy in a probate is alleged, the court looks at the original will: *Re Cliff's Trusts* [1892] 2 Ch 229. See also *Philipps v Chamberlaine* (1798) 4 Ves 51 at 57 (mistake alleged); *Compton v Bloxham* (1845) 2 Coll 201 at 204 (original will construed).

8 Cf EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 132.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/489. Other documents referred to in the will.

489. Other documents referred to in the will.

Even though a document is not admitted to probate, it may be referred to in a will in such a manner that the court of construction is entitled to look at it, as being virtually incorporated in that which is admitted to probate¹. For this to be possible, the document must be clearly identified by the description given of it in the will, and it must be shown to have been in existence at the time when the will was executed². If the document is expressly directed not to form part of the will, it is not admissible to explain the will³. A testator cannot by his will reserve a power to dispose of his property by an instrument not duly executed as a will or codicil, or orally, and evidence of any such instrument or oral disposition is, therefore, inadmissible to show his testamentary wishes⁴. If a will refers in the alternative to two documents, that is, an existing document or a future substituted document, evidence as to the existence of the future document cannot be admitted and, consequently, evidence of the former document cannot be admitted either as it would not reveal the testator's whole intention, and the gift, therefore,

fails for uncertainty⁵. A gift on the trusts of an existing settlement may, however, be effective, even though some of the trusts cannot be given effect as testamentary dispositions⁶.

1 *Quihampton v Going* (1876) 24 WR 917. See also *Allen v Maddock* (1858) 11 Moo PCC 427 at 445, 461. As to the incorporation of documents for the purpose of being included in the grant of probate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105.

2 *Dillon v Harris* (1830) 4 Bli NS 321 at 359, HL; *Allen v Maddocks* (1858) 11 Moo PCC 427 at 454; *Quihampton v Going* (1876) 24 WR 917 (entries in ledger); *Singleton v Tomlinson* (1878) 3 App Cas 404 at 413-414, HL, per Lord Cairns (schedule of property); *Re Deprez, Henriques v Deprez* [1917] 1 Ch 24 (entries in testator's account books: see PARA 690 note 3 post); *Re White, Knight v Briggs* [1925] Ch 179.

3 *Re Louis, Louis v Treloar* (1916) 32 TLR 313.

4 *Habergham v Vincent* (1793) 2 Ves 204; *Johnson v Ball* (1851) 5 De G & Sm 85 at 91; *Re Fane, Fane v Fane* (1886) 2 TLR 510; *Re Hyslop, Hyslop v Chamberlain* [1894] 3 Ch 522. See also *Reynolds v Kortright* (1854) 18 Beav 417; *Re Walsh, Keenan v Brown* (1911) 30 NZLR 1166.

5 *Re Jones, Jones v Jones* [1942] Ch 328, [1942] 1 All ER 642.

6 *Re Edwards' Will Trusts, Dagleish v Leighton* [1948] Ch 440, [1948] 1 All ER 821, CA; *Re Schintz's Will Trusts, Lloyds Bank Ltd v Moreton* [1951] Ch 870, [1951] 1 All ER 1095. A gift on the trusts of a deed which does not become operative fails: *Re Hurdle, Balkeney v Hurdle* [1936] 3 All ER 810.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/490. Evidence to interpret words used.

490. Evidence to interpret words used.

Where the characters in which a will is written are difficult to decipher¹, or the language of the will is a language not understood by the court², or is the language of a trade, business or locality with which the testator was acquainted³, the evidence of persons who are skilled in deciphering writing or who understand the language in which the will is written is admissible to declare what the words and characters are, and to inform the court of their proper meaning⁴. Evidence may not, however, be admitted to show that the testator understood common words in a special sense⁵, or to explain words or symbols which are not the language of any trade, business or locality, and are known only to the testator himself⁶, except such evidence as the will itself refers to as the means by which the meaning of the words or symbols used in it is to be ascertained⁷.

1 *Masters v Masters* (1718) 1 P Wms 421 at 425 (illegible writing).

2 See PARA 491 note 1 post.

3 *Kell v Charmer* (1856) 23 Beav 195 (use of business symbols denoting prices). See also *Goblet v Beechey* (1831) 2 Russ & M 624 (handwriting expert and trade expert in conflict); *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 525, HL (local language etc); *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, CA ('securities' in will of a stockbroker).

4 Wigram's Extrinsic Evidence (5th Edn) p 53, Proposition IV.

5 *King v Badeley* (1834) 3 My & K 417 ('contingent interests'; testator meant expectancies); *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 558, HL; *Barrow v Methold* (1855) 1 Jur NS 994 ('premium of insurance'; testator meant policy). However, in the case of a testator who died on or after 1 January 1983, extrinsic evidence may be admitted to assist in interpreting a meaningless or ambiguous part of the will: see PARAS 483 ante, 506-507 post.

6 *Goblet v Beechey* (1831) 2 Russ & M 624; Wigram's Extrinsic Evidence (5th Edn) p 201, Appendix I; *Clayton v Lord Nugent* (1844) 13 M & W 200 at 206 (cited in note 7 infra). As to deaths on or after 1 January 1983, however, see note 5 supra.

7 See *Clayton v Lord Nugent* (1844) 13 M & W 200 at 206, where a will indicated donees by letters or symbols, and referred for their meaning to a card index; the card index mentioned in the will would have been admissible for the purpose of identifying devisees, but a later index, signed but not attested, which had replaced the earlier index, was not admissible for this purpose. The later index was, however, admissible for identifying donees under a gift of personalty, as a gift of personalty, unlike a devise, did not at the date of the will require to be attested: see *East v Twyford* (1853) 4 HL Cas 517. As to the incorporation of documents in wills see PARA 489 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 105.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/491. Foreign wills.

491. Foreign wills.

Where a foreign will is to be construed, there must be a translation of the instrument, and evidence may be admitted to prove:

- 50 (1) the translation of the words;
- 51 (2) the technical meaning of words which are of a technical description or which have a peculiar meaning different from that which they would bear when literally translated into English¹; and
- 52 (3) where the construction of the will is governed by a foreign system of law, any established principle of construction which would be applied to the particular instrument by the corresponding foreign tribunal².

1 In the case of a foreign will containing foreign technical terms the court avails itself of the assistance of foreign lawyers: *Reynolds v Kortright* (1854) 18 Beav 417 at 425; *Re Cliff's Trusts* [1892] 2 Ch 229 at 232; *Re Manners, Manners v Manners* [1923] 1 Ch 220. As to the foreign element in wills see PARAS 310-311 ante.

2 *Duchess di Sora v Philipps* (1863) 10 HL Cas 624 at 633, 639-640, correcting the report of *Williams v Williams* (1841) 3 Beav 547. Alternatively, the original will may be looked at: *Re Manners, Manners v Manners* [1923] 1 Ch 220. See also CIVIL PROCEDURE vol 11 (2009) PARA 800; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 201. As to the construction of foreign wills see further PARA 530 post; and CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 452-455.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/492. Evidence of meaning of legal technical terms.

492. Evidence of meaning of legal technical terms.

Evidence may not be admitted to determine the meaning of technical terms of English law. The terms which constitute technical terms in English law, and their technical meanings¹, are determined by the court with the aid, in certain cases, of established rules of construction. In considering a technically drawn will, the court regards the practice of conveyancers as not wholly irrelevant but not binding².

1 Examples of technical terms are 'seised' (*Leach v Jay* (1878) 9 ChD 42, CA); 'vested' (see PARA 696 post); 'plurality' (*Re Macnamara, Hewitt v Jeans* (1911) 104 LT 771). As to technical and quasi-technical words

describing property or donees see PARAS 577 et seq, 619 et seq post. As to the former use in wills of words appropriate to a conveyance under the Statute of Uses (1535) see *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465 at 478, CA; Tudor, LC Real Prop (4th Edn) 307 et seq. See also REAL PROPERTY vol 39(2) (Reissue) PARA 23.

2 *Re Athill, Athill v Athill* (1880) 16 ChD 211 at 223, CA; *Re Edwards, Edwards v Edwards* [1894] 3 Ch 644. See also *Villar v Gilbey* [1907] AC 139 at 152, HL, per Lord Atkinson. In considering what are 'usual' clauses, the court treats the question as one of fact, on which evidence of the practice of conveyancers is accepted: *Re Maddy's Estate, Maddy v Maddy* [1901] 2 Ch 820 at 822.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/493. Evidence of the ordinary meaning of words.

493. Evidence of the ordinary meaning of words.

The ordinary meaning of a word is the meaning given to it by the ordinary usage of society¹, that is, the testator's society, of that class and period in which he lived and moved². Accordingly, in order to discover the ordinary meaning of any word, the court may not only consult dictionaries of good reputation³, or other contemporary literary sources⁴, but may also consider evidence of the meaning customarily given to the word by persons in such society⁵, and, in the case of words describing property, by those who deal in such property⁶. In the construction of the will of a testator who died before 1 January 1983⁷, such evidence is not admitted where the meaning is plain and unambiguous on the face of the will⁸, but, in relation to the will of a testator who died on or after that date, in so far as such evidence shows that the language is ambiguous⁹ in the light of surrounding circumstances, it is admissible together with all other relevant extrinsic evidence, including evidence of the testator's intention¹⁰. The ordinary meaning of a word is not necessarily the etymological meaning¹¹, but there may be cases where the court refers to the etymological meaning as a guide¹².

1 See generally para 512 post; and see also *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 537, HL, per Coleridge J; *Parker v Marchant* (1843) 1 Ph 356 at 360 ('the ordinary acceptance of language in the transactions of mankind'); *Re How, How v How* [1930] 1 Ch 66; *Re Atkinson's Will Trusts, Atkinson v Hall* [1978] 1 All ER 1275, [1978] 1 WLR 586.

2 *M'Hugh v M'Hugh* [1908] 1 IR 155 at 160 (not archaic or obsolete meaning).

3 *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, CA. The court is not bound by the dictionary: see *Grieves v Rawley* (1852) 10 Hare 63 at 65; and CIVIL PROCEDURE vol 11 (2009) PARA 944.

4 *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176 at 187, CA (the Times newspaper). Cf *A-G v Cast-Plate Glass Co* (1792) 1 Anst 39 at 44 ('dictionaries or books on the particular subject'); *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 568-569, HL; *Marquis Camden v IRC* [1914] 1 KB 641, CA ('any literary help they can find, including the consultation of the works of standard authors and authoritative dictionaries').

5 *Barksdale v Morgan* (1693) 4 Mod Rep 185; *Re Steel, Wappett v Robinson* [1903] 1 Ch 135 ('freeholds' by local usage included customary freeholds); *Re Van Lessen, National Provincial Bank Ltd v Beaumont* [1955] 3 All ER 691, [1955] 1 WLR 1326 (usage among philatelists). The customary meaning prevails, even though the words in their meaning according to general English usage would create no difficulty in applying the instrument to the facts: Underhill and Strahan's Interpretation of Wills and Settlements (3rd Edn) pp 15-16. The question whether a word has a customary meaning is one of fact: *Simpson v Margitson* (1847) 11 QB 23 at 32. As to custom generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 601 et seq. Where, however, a word has received a statutory definition of general application, evidence of a different local usage is inadmissible: *O'Donnell v O'Donnell* (1878) 1 LR 1r 284. Cf *Church Property Trustees v Public Trustee* (1907) 27 NZLR 354.

6 *Brannigan v Murphy* [1896] 1 IR 418 at 426; *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176 at 188 per Vaughan Williams LJ; *Re Herring, Murray v Herring* [1908] 2 Ch 493; *Re Van Lessen, National Provincial Bank Ltd v Beaumont* [1955] 3 All ER 691, [1955] 1 WLR 1326 (evidence of stamp dealers).

- 7 As to the significance of this date see PARA 483 note 1 ante.
- 8 Cf *Earl de la Warr v Miles* (1881) 17 ChD 535 at 588-589.
- 9 For the meaning of 'ambiguity' in this context see PARA 507 post.
- 10 See PARAS 483 ante, 506-507 post.
- 11 *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 527, HL.
- 12 *Parr v Parr* (1833) 1 My & K 647 at 648 ('devolve').

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/494. Decisions as to ordinary meaning.

494. Decisions as to ordinary meaning.

The ordinary meaning, and, therefore, legal interpretation, of words may vary from time to time according to the usages of the community¹, and there are often many meanings applied in common use to any given word². Accordingly, it has often been a matter for judicial decision in the construction of wills and other documents what is, or was, at a given time the ordinary meaning of a particular word, or the secondary meanings which are or were capable of being given to it³.

- 1 See generally para 512 post; and see also *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 527, HL; *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176 at 185, CA; *Perrin v Morgan* [1943] AC 399 at 417, [1943] 1 All ER 187 at 195, HL, per Lord Thankerton.
- 2 See *Cave v Horrell* [1912] 3 KB 533, CA. Instances are 'family' (see PARA 636 post) and 'money' (see PARA 584 post). As to departing from the primary meaning of words see *Pigg v Clarke* (1876) 3 ChD 672 at 674 per Jessel MR; and see further PARA 533 post.
- 3 As to the reliance to be placed on previous decisions on the construction of other wills see PARA 528 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/495. Evidence to vary terms of will.

495. Evidence to vary terms of will.

Evidence may never be given in a court of construction in order to complete an incomplete will¹, or to add to², vary³ or contradict⁴ the terms of a will, or generally to prove any testamentary intentions of the testator not found in the will⁵, or even to reconcile two contradictory clauses, and declare which of the two expresses the testator's real intention⁶.

- 1 Thus no evidence can be given for the purpose of filling up a total blank in a will: *Winne v Littleton* (1681) 2 Cas in Ch 51; *Baylis v A-G* (1741) 2 Atk 239; *Hunt v Hort* (1791) 3 Bro CC 311; *Taylor v Richardson* (1853) 2 Drew 16. As to filling up blanks by construction alone see PARA 544 post.
- 2 Eg by inserting a devise or bequest omitted by mistake of the draftsman: *Earl of Newburgh v Countess Dowager of Newburgh* (1820) 5 Madd 364. See also *Selwin v Brown* (1735) 3 Bro Parl Cas 607, HL; *Langston v Langston* (1834) 8 Bli NS 167 at 214, HL (where the court arrived at the conclusion that an error in copying had been made on the instrument as it stood). See also *Whitton v Russell* (1739) 1 Atk 448. As to the jurisdiction to

correct mistakes see further PARA 477 ante; and as to possible rectification in such circumstances see PARA 408 ante.

3 Eg by changing the name or description of a legatee (*Del Mare v Robello* (1792) 1 Ves 412; *Drake v Drake* (1860) 8 HL Cas 172; *Re Ely, Tottenham v Ely* (1891) 65 LT 452 (but as to this case see PARA 508 note 1 post)), or by including a legatee among the persons referred to in a condition (*Lord Cheyney's Case* (1591) 5 Co Rep 68a), or by varying the terms of a legacy (*Lowfield v Stoneham* (1746) 2 Stra 1261), or by adding conditions to a legacy (*Vernon's Case* (1572) 4 Co Rep 1a at 4a; *Lawrence v Dodwell* (1699) 1 Ld Raym 438).

4 *Hampshire v Peirce* (1751) 2 Ves Sen 216 at 217 per Strange MR (where the evidence tendered and rejected with respect to one gift was received as evidence of identification with regard to another); *Clementson v Gandy* (1836) 1 Keen 309. See also *Brown v Langley* (1731) 2 Barn KB 118. Thus no evidence can be given to prove a trust when the terms of the will expressly give a beneficial interest, or vice versa (*Langham v Sandford* (1816) 2 Mer 6 at 17 per Lord Eldon LC; *Irvine v Sullivan* (1869) LR 8 Eq 673 at 677; *Re Huxtable, Huxtable v Crawford* [1902] 2 Ch 793, CA; *Re Keen, Evershed v Griffiths* [1937] Ch 236 at 247, [1937] 1 All ER 452 at 459, CA; *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA), except in cases of fraud (*Russell v Jackson* (1852) 10 Hare 204; *Re Spencer's Will* (1887) 57 LT 519, CA). See PARA 509 post.

5 *Bertie v Falkland* (1698) 1 Salk 231 at 232; *Bennet v Davis* (1725) 2 P Wms 316 at 318. As to the circumstances in which extrinsic evidence of intention is admissible see PARAS 483 ante, 506-507 post.

6 *Ulrich v Litchfield* (1742) 2 Atk 372; *Re Bywater, Bywater v Clarke* (1881) 18 ChD 17, CA. It is open to question whether it could be said that in such a case the language used 'in any part' of the will was ambiguous on its face so as to bring the Administration of Justice Act 1982 s 21 into operation: see PARA 483 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(ii) Evidence of Language and its Meaning/496. Other evidence of the testator's wishes.

496. Other evidence of the testator's wishes.

Although evidence may be admissible to prove matters constituting an obligation accepted by the donee¹, evidence is not in general admissible to establish testamentary wishes of the testator not manifested in the way required by statute². Accordingly, where a mere power, as opposed to a trust³, is given by the will to the donee to dispose of property in accordance with wishes orally expressed by the testator, evidence is not admissible to determine the testator's wishes⁴.

1 As to such cases see PARA 509 post.

2 *Irvine v Sullivan* (1869) LR 8 Eq 673 at 678. See also *Briggs v Penny* (1849) 3 De G & Sm 525 (on appeal (1851) 3 Mac & G 546). As to the circumstances in which evidence of the testator's intention is admissible see, however, PARAS 483 ante, 506-507 post.

3 As to secret trusts see *Blackwell v Blackwell* [1929] AC 318, HL; *Re Young, Young v Young* [1951] Ch 344, [1950] 2 All ER 1245; paras 509-510 post; and TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

4 *Re Hetley, Hetley v Hetley* [1902] 2 Ch 866. Cf *Shirinbai v Ratanbai* (1921) LR 48 Ind App 69, PC (where the oral directions to the donee as to disposal by her will did not deprive the donee of her discretion).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/497. Evidence necessarily admissible.

(iii) Evidence for Purposes of Identification

497. Evidence necessarily admissible.

The words of a testator's will necessarily refer to facts and circumstances respecting his property and his family and other persons and things, and the meaning and application of his words cannot be ascertained without evidence of such facts and circumstances¹. Evidence is, therefore, necessarily admissible to show facts and circumstances corresponding, as far as possible, with those referred to in the will, for example to show that persons and property actually exist as described².

The court must, however, first attempt to construe the words of the will³; and the questions whether further evidence is to be considered, and what is the materiality of that evidence, depend on the construction placed on those words and on the existence of any subject matter to which they exactly correspond⁴.

1 *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 367-368 per Lord Abinger CB; *Tudor, LC Real Prop* (4th Edn) 489; *Re Birkin, Heald v Millership* [1949] 1 All ER 1045 at 1047 per Harman J.

2 See *Sherratt v Mountford* (1873) 8 Ch App 928 at 929 per James LJ. See also *Sanford v Raikes* (1816) 1 Mer 646 at 653; *Doe d Preedy v Holtom* (1835) 4 Ad & El 76 at 82.

3 *Re Seal, Seal v Taylor* [1894] 1 Ch 316 at 322-323, CA; *Re Sykes, Skelton and Dyson v Sykes* [1940] 4 All ER 10. See also *Higstrim v Ray* (1895) 16 NSWLR Eq 1.

4 Where the evidence may be material, it is generally admitted in the first instance, reserving the question of its materiality: *Sayer v Sayer, Innes v Sayer* (1849) 7 Hare 377 at 381.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/498. Plain and unambiguous gift.

498. Plain and unambiguous gift.

The evidence necessarily admitted may disclose the existence of persons or property exactly answering the description in the will¹, and show that the will contains a plain, unambiguous and effective gift. Where the testator in such a case died before 1 January 1983², further evidence is not admissible³ to show that he must have meant some person or property different from that which his words plainly and unambiguously described⁴, such as evidence of the testator's fuller knowledge of or intimacy with other persons⁵, or his want of knowledge of the person so described⁶, or his habit of describing any other person in the same terms⁷; or the state or value generally of the testator's property⁸, where the will itself does not make that state or value of importance⁹; or his knowledge or management¹⁰, or the history¹¹, of the property or any part of it; or the testator's habits of describing other property in the same terms¹². However, in the construction of the will of a testator who died on or after 1 January 1983, such evidence is admissible to raise an ambiguity¹³, and extrinsic evidence, including evidence of the testator's intention, may be given to resolve it¹⁴.

Evidence (other than evidence of the testator's intention) was and has always been admissible to raise a latent ambiguity¹⁵, as by showing that there exists some other subject matter to which the same word might equally, or with a negligible variation, apply¹⁶. Where such an ambiguity is disclosed, extrinsic evidence of intention is and has always been admissible to resolve it¹⁷.

1 *Horwood v Griffith* (1853) 4 De GM & G 700 at 708; *Millard v Bailey* (1866) LR 1 Eq 378; *Re Seal, Seal v Taylor* [1894] 1 Ch 316 at 323; *Re Trimmer, Crundwell v Trimmer* (1904) 91 LT 26.

2 le the date on which the Administration of Justice Act 1982 s 21 came into force: see s 76(11). Nothing in s 21 affects the will of a testator who died before that date: s 73(6)(c). See also PARAS 483 ante, 507 post.

3 See Just Dig lib 32 s 25; *Re Millar, Barnard v Mahoney* (1898) 17 NZLR 160.

4 *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 565, HL, per Tindal CJ; *Re Overhill's Trust* (1853) 1 Sm & G 362 at 366; *Horwood v Griffith* (1853) 4 De GM & G 700 at 708 per Turner LJ.

5 *Holmes v Custance* (1806) 12 Ves 279; *Wilson v Squire* (1842) 1 Y & C Ch Cas 654; *Re Williams, Gregory v Muirhead* (1913) 134 LT Jo 619.

6 *Re Corsellis, Freeborn v Napper* [1906] 2 Ch 316.

7 *Green v Howard* (1779) 1 Bro CC 31 ('relations'); *Ellis v Houstoun* (1878) 10 ChD 236 at 245 ('children'); *Re Parker, Bentham v Wilson* (1881) 17 ChD 262, CA ('second cousins'); *Re Fish, Ingham v Rayner* [1894] 2 Ch 83, CA ('niece'; the actual decision in this case would now be different having regard to the Family Law Reform Act 1987 ss 1, 19 (as amended): see PARA 644 post).

8 *Brown v Langley* (1731) 2 Barn KB 118; *Lord Inchiquin v French* (1744) Amb 33 at 40; *Kellett v Kellett* (1811) 1 Ball & B 533 at 542; *Hensman v Fryer* (1867) 3 Ch App 420 at 424; *Re Grainger, Dawson v Higgins* [1900] 2 Ch 756 at 768-769, CA, per Rigby LJ (revsd sub nom *Higgins v Dawson* [1902] AC 1, HL, where, however, the question was rather of construction of the will than of identification).

9 Such evidence may become admissible (see PARA 499 post) where the descriptions are not clear in the will and are unintelligible without receiving such evidence (*Fonnereau v Poyntz* (1785) 1 Bro CC 472 (explained in *Druce v Denison* (1801) 6 Ves 385 at 401); *Colpoys v Colpoys* (1822) Jac 451; *A-G v Grote* (1827) 2 Russ & M 699 (cited in Wigram's Extrinsic Evidence (5th Edn) p 216, Appendix II); *Boys v Williams* (1831) 2 Russ & M 689; *Hensmann v Fryer* (1867) 3 Ch App 420; *Watson v Arundell* (1876) IR 11 Eq 53 at 75, Ir CA), or where the testator expressly makes the gifts by reference to the amount of his property (*Barksdale v Gilliat* (1818) 1 Swan 562; *Druce v Denison* supra (explained in *Re Grainger, Dawson v Higgins* [1900] 2 Ch 756, CA)). See also *Re Skillen, Charles v Charles* [1916] 1 Ch 518 (evidence admitted as to state of property of testatrix, but not as to intention); *Grealey v Sampson* [1917] 1 IR 286, Ir CA (evidence not admissible where the question was one of construction). As to such evidence for the purpose of proving the exercise of a power see POWERS vol 36(2) (Reissue) PARA 322.

10 *Horwood v Griffith* (1853) 4 De GM & G 700. The rule applies especially to cases where the property is described by its local description: *Anon* (1567) 3 Dyer 261b; *Woodden v Osbourn* (1599) Cro Eliz 674; *Doe d Browne v Greening* (1814) 3 M & S 171 at 173; *Doe d Tyrrell v Lyford* (1816) 4 M & S 550 at 555; *Miller v Travers* (1832) 8 Bing 244; *Doe d Templeman v Martin* (1833) 4 B & Ad 771; *Homer v Homer* (1878) 8 ChD 758 at 774, CA.

11 *Millard v Bailey* (1866) LR 1 Eq 378 (gift of shares which had been doubled or subdivided).

12 *Doe d Chichester v Oxenden* (1810) 3 Taunt 147; subsequent proceedings sub nom *Doe d Oxenden v Chichester* (1816) 4 Dow 65, HL ('my estate of A'; evidence not admissible to show testator's habit of including outlying property in this estate). See also *Doe d Brown v Brown* (1809) 11 East 441 (devise of 'copyhold estates'; evidence not admissible to show habit of describing certain freeholds as copyhold); *Doe d Tyrrell v Lyford* (1816) 4 M & S 550 at 557-558; *Evans v Angell* (1858) 26 Beav 202 at 207; *King v King* (1885) 13 LR Ir 531.

13 For the meaning of 'ambiguity' in this context see PARA 507 post.

14 See PARAS 483 ante, 506-507 post.

15 See note 13 supra.

16 *Doe d Templeman v Martin* (1833) 4 B & Ad 771 at 783 (where it was said that almost any evidence would be admissible for showing an ambiguity); *Grant v Grant* (1870) LR 5 CP 380 (on appeal LR 5 CP 727, Ex Ch); *Re Bowman, Bowman v Bowman* (1891) 8 TLR 117; *Marks v Marks* (1908) 40 SCR 210.

17 As to evidence of surrounding circumstances see PARA 499 et seq post; and as to evidence of testator's intention see PARA 506 post. As to ambiguities in the will of a testator who died on or after 1 January 1983 see the Administration of Justice Act 1982 s 21; and PARAS 483 ante, 507 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/499. Gift not plain and unambiguous.

499. Gift not plain and unambiguous.

Where the words of a will do not plainly and unambiguously refer to any subject, or do so only with inaccuracy¹, or where after the admission of extrinsic evidence it is seen that they refer to more than one subject², further evidence is then admissible in order to discover the true subject to which the words refer³. Where such evidence discloses an ambiguity⁴, or, in the case of a testator dying on or after 1 January 1983⁵, where the will is meaningless or an ambiguity appears on the face of the will⁶, extrinsic evidence of the testator's intention may be given⁷. The fact that there is no person who answers the description in the will does not, however, render evidence that some other person was intended admissible where there are indications that the testator made the gift in spite of his ignorance whether any such person existed⁸.

Where the words were plainly and unambiguously satisfied before, but not at, the date of the will, as, for example, where the person described has died⁹ or the property described has ceased to conform to the description¹⁰ before that date, further evidence has always been admitted to discover some other subject existing at that date to which the words as understood by the testator may refer.

1 As to inaccuracy of descriptions generally see PARA 560 et seq post.

2 *Miller v Travers* (1832) 8 Bing 244 at 248; *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 368.

3 *Miller v Travers* (1832) 8 Bing 244 at 247-248; *Re Ray, Cant v Johnstone* [1916] 1 Ch 461.

4 For the meaning of 'ambiguity' in this context see PARA 508 post.

5 I.e. the date on which the Administration of Justice Act 1982 s 21 came into force: see s 76(11). Nothing in s 21 affects the will of a testator who died before that date: s 73(6)(c).

6 As to meaningfulness and patent ambiguity see PARAS 483 ante, 507 post.

7 See PARAS 506-507 post.

8 *Del Mare v Robello* (1792) 1 Ves 412 (where a gift to the children of one sister who was a nun was not read as a gift to the children of another sister); *Daubeny v Coghlan* (1842) 12 Sim 507 at 518.

9 *Stringer v Gardiner* (1859) 4 De G & J 468; *Re Halston, Ewen v Halston* [1912] 1 Ch 435. See further PARA 570 post. As to the doctrine of lapse see PARA 450 et seq ante.

10 *Re Jameson, King v Winn* [1908] 2 Ch 111; *Re Brady, Wylie v Ratcliff* (1919) 147 LT Jo 235 (description of railway stock); but cf *Re Atlay, Atlay v Atlay* (1912) 56 Sol Jo 444 (where the evidence was treated as direct evidence of intention and excluded).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/500. Evidence of surrounding circumstances.

500. Evidence of surrounding circumstances.

Where the words of the will have no reasonable application to the circumstances proved, further evidence of the surrounding circumstances, including, in construing the will of a testator who died on or after 1 January 1983¹, evidence of his actual intention², is admissible to discover

the meaning of the words which give the will full effect³. In all such cases, for the purpose of determining the object of the testator's bounty⁴, or the subject matter disposed of⁵, or the quantity of interest intended to be given⁶, or the other persons and things described by the will⁷, and the facts and circumstances there referred to, a court of construction may, and must⁸, inquire into every material fact relating to the person or thing said to be identified by that description⁹.

For this purpose, evidence is admissible to enable the court to ascertain all the persons and facts which were known to the testator at the time when he made his will¹⁰, and thus to place itself in the testator's position¹¹. The court, it is said, puts itself into the testator's armchair¹².

The object of admitting evidence of surrounding circumstances is not for the purpose of speculating on what the testator's intention may have been, where no direct evidence is available¹³, but of ascertaining whether the circumstances by which he was surrounded afford any certain indication of his intention¹⁴. Such evidence is not likely to be of assistance where the subject matter in dispute was not in existence at the date of the will¹⁵, or where, on the construction of the will as a whole, it appears that no gift was intended by the words used¹⁶.

1 The date on which the Administration of Justice Act 1982 s 21 (see PARAS 483 ante, 507 post) came into force: see s 76(11). Nothing in s 21 affects the will of a testator who died before that date: s 73(6)(c).

2 As to the admissibility of evidence of intention where any part of a will is meaningless see PARA 483 ante.

3 *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 368; *Shore v Wilson, Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 566, HL, per Tindal CJ; *Re Glassington, Glassington v Follett* [1906] 2 Ch 305 at 313; *Re Ray, Cant v Johnstone* [1916] 1 Ch 461; *Re Vear, Vear v Vear* (1917) 62 Sol Jo 159; Wigram's Extrinsic Evidence (5th Edn) p 47, Proposition III. This proposition is not affected by *Higgins v Dawson* [1902] AC 1, HL: see *Re Glassington, Glassington v Follett* supra at 314; *Re Cain's Will, Linehan v Cain* [1913] VLR 50 at 57-58.

4 *Abbot v Massie* (1796) 3 Ves 148 (gifts to 'W G' and 'Mrs G'); *Price v Page* (1799) 4 Ves 680 (forename left blank); *Doe d Le Chevalier v Huthwaite* (1820) 3 B & Ald 632 ('to S H second son of J H', he being the third son); *Lord Camoys v Blundell* (1848) 1 HL Cas 778 ('to second son of E W of L', shown by the circumstances to mean second son of J W of L); *Bernasconi v Atkinson* (1853) 10 Hare 345; *Re Bowman, Bowman v Bowman* (1891) 8 TLR 117 ('to Edmund', shown to mean Edward commonly called Edmund); *Re Waller, White v Scoles* (1899) 80 LT 701, CA ('daughters' of S shown to mean sisters of S). As to misdescription of charities, and as to the evidence admissible to clarify ambiguity, see CHARITIES vol 8 (2010) PARAS 108-109.

5 *Goodtitle d Radford v Southern* (1813) 1 M & S 299, 301; *Sanford v Raikes* (1816) 1 Mer 646 at 653; *Okeden v Clifden* (1826) 2 Russ 309 at 318; *Re Glassington, Glassington v Follett* [1906] 2 Ch 305 ('real estate' where testatrix had only proceeds of sale of real estate).

6 *Lowe v Lord Huntingtower* (1824) 4 Russ 532n; *Blundell v Gladstone* (1841) 11 Sim 467 at 486; *Dashwood v Magniac* [1891] 3 Ch 306 at 355-356, 366, 372, CA (evidence of local customs of cultivation, including cutting of beech trees, and practice with regard to treatment of proceeds as income or capital, and rights of limited owners).

7 *Thomson and Baxter v Hempenstall* (1849) 13 Jur 814.

8 *Anstee v Nelms* (1856) 1 H & N 225 at 232-233 per Bramwell B.

9 See Wigram's Extrinsic Evidence (5th Edn) p 57, Proposition V; *Doe d Gore v Langton* (1831) 2 B & Ad 680 at 689, 694; *Anstee v Nelms* (1856) 1 H & N 225; *Bunbury v Doran* (1874) IR 8 CL 516 (testator's religious views); *Dashwood v Magniac* [1891] 3 Ch 306, CA. Wigram's Extrinsic Evidence (5th Edn) p 57, Proposition V which, so far as it relates to the discovery of the object of the testator's bounty and the subject of disposition, was approved in *Anstee v Nelms* supra, proceeds as follows: 'The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words'. Cf, however, PARA 483 text and note 6 ante.

10 For this purpose, it is the duty of personal representatives or trustees to lay before the court all relevant facts within their knowledge: *Re Herwin, Herwin v Herwin* [1953] Ch 701, [1953] 2 All ER 782, CA.

11 *Re Overhill's Trust* (1853) 1 Sm & G 362 at 366; *Bernasconi v Atkinson* (1853) 10 Hare 345 at 348 per Wood V-C (adopted in *Charter v Charter* (1874) LR 7 HL 364 at 377 per Lord Cairns LC; *Kingsbury v Walter* [1901] AC 187 at 189, HL, per Lord Halsbury LC); *Slingsby v Grainger* (1859) 7 HL Cas 273 at 288 per Lord

Kingsdown; *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 763-764, HL, per Lord Blackburn; *Re Gibbs, Martin v Harding* [1907] 1 Ch 465 at 469; *Re Eve, Edwards v Burns* [1909] 1 Ch 796 at 799. See also *Re Stephen, Stephen v Stephen* [1913] WN 210.

12 *Boyes v Cook* (1880) 14 ChD 53 at 56, CA, per James LJ; *Clifford v Koe* (1880) 5 App Cas 447 at 462, HL, per Lord Hatherley; *Fitzgerald v Ryan* [1899] 2 IR 637 at 658 per O'Brien CJ; *Re Vaughan, Scott v British and Foreign School Society* (1901) 17 TLR 278 at 279; *Re Sykes, Sykes v Sykes* [1909] 2 Ch 241 at 251, CA, per Farwell LJ; *Re Wills, Wills v Wills* [1909] 1 IR 268 at 276, Ir CA; *Perrin v Morgan* [1943] AC 399 at 420, [1943] 1 All ER 187 at 197, HL, per Lord Romer. See also PARA 399 note 10 ante. As to a distinction between the construction of contracts and that of wills in this respect see *Grant v Grant* (1870) LR 5 CP 727 at 728-729, Ex Ch, per Blackburn J.

13 See PARA 483 ante.

14 *Blackwell v Pennant* (1852) 9 Hare 551 at 552 per Turner V-C.

15 *Re Price, Price v Newton* [1905] 2 Ch 55 at 58.

16 *Re Sykes, Skelton and Dyson v Sykes* [1940] 4 All ER 10.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/501. Evidence to identify the subject matter disposed of.

501. Evidence to identify the subject matter disposed of.

In order to identify the subject matter disposed of by a will, all facts relating to the subject matter and object of the gift, such as that it was or was not in the testator's possession, the mode of acquiring it, the local situation, and the distribution of the property, are admissible¹. In the case of a devise of land in a particular parish, evidence of general reputation as to whether the land in question is in that parish is admissible².

1 *Doe d Templeman v Martin* (1833) 4 B & Ad 771 at 785; *Re Vear, Vear v Vear* (1917) 62 Sol Jo 159.

2 *Anstee v Nelms* (1856) 1 H & N 225.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/502. Evidence of the testator's knowledge.

502. Evidence of the testator's knowledge.

The evidence of the surrounding circumstances which may be admitted in construing a will¹ includes evidence not only of the testator's circumstances and those of his family and affairs², but also of his state of knowledge and belief with regard to those circumstances. Thus where the surname of the intended donee is omitted, evidence is admissible of the testator's knowledge of persons having the forename mentioned in the will³, and, where the forename is omitted, of persons having the surname referred to⁴. Evidence is also admissible of the testator's understanding of what the name of a certain person was⁵; or of his knowledge that a person answering the description in the will was dead⁶, or amply provided for⁷; or his knowledge of the state of his own or another family⁸; or his knowledge of or friendship with the persons alleged to be the donees described in the will, or of the degrees of his intimacy with them⁹. On the same principle, in the case of a gift to a charity, evidence is admissible that the testator was interested in or subscribed to a particular charity¹⁰.

1 See PARAS 500-501 ante.

2 Eg that the testator was to his own knowledge incapable of having further issue: *Re Wohlgemuth, Public Trustee v Wohlgemuth* [1949] Ch 12, [1948] 2 All ER 882; *Re Herwin, Herwin v Herwin* [1953] Ch 701, [1953] 2 All ER 782, CA. See also PARA 639 text and note 5 post.

3 *Re De Rosaz* (1877) 2 PD 66.

4 *Re Gregson's Trust* (1864) 2 Hem & M 504 at 509. See also *Gregory v Smith* (1852) 9 Hare 708.

5 *Bradshaw v Bradshaw* (1836) 2 Y & C Ex 72 at 88; *Blundell v Gladstone* (1841) 11 Sim 467 at 486 (on appeal sub nom *Lord Camoys v Blundell* (1848) 1 HL Cas 778 at 785).

6 *Re Whorwood, Ogle v Lord Sherborne* (1887) 34 ChD 446 at 450, CA. See also *Stringer v Gardiner* (1859) 4 De G & J 468 at 471.

7 *Hodgson v Clarke* (1860) 1 De GF & J 394 at 397-398.

8 *Doe d Thomas v Beynon* (1840) 12 Ad & El 431. See also *Goodinge v Goodinge* (1749) 1 Ves Sen 231; *Re Gregory's Settlement and Will* (1865) 34 Beav 600; *Re Taylor, Cloak v Hammond* (1886) 34 ChD 255. Knowledge of the state of the family of a cousin or remoter relative is apparently not presumed: *Crook v Whitley* (1857) 7 De GM & G 490 at 496; *Re Herbert's Trusts* (1860) 1 John & H 121 at 124.

9 *King's College Hospital v Wheildon* (1854) 18 Beav 30; *Re Feltham's Will Trusts* (1855) 1 K & J 528; *Re Gregory's Settlement and Will* (1865) 34 Beav 600; *Re Noble's Trusts* (1870) IR 5 Eq 140; *Re Twohill* (1879) 3 LR Ir 21; *Re Brake* (1881) 6 PD 217; *Phelan v Slattery* (1887) 19 LR Ir 177; *Re Wyatt, Furniss v Phear* (1888) 36 WR 521; *Re Chappell* [1894] P 98; *Re Beale, Beale v Royal Hospital for Incurables* (1890) 6 TLR 308, CA; *Re Jeffery, Nussey v Jeffery* [1914] 1 Ch 375. In such cases the court inclines to construe the gift as being to the person whom the testator knew best: cf para 516 post.

10 *Re Briscoe's Trusts* (1872) 20 WR 355. See also *Re Kilvert's Trusts* (1871) 7 Ch App 170; *Re Fearn's Will* (1879) 27 WR 392; *British Home and Hospital for Incurables v Royal Hospital for Incurables* (1904) 90 LT 601, CA; *Re Julian, O'Brien v Missions to Seamen Trust Corp'n Ltd* [1950] IR 57 at 64. Such evidence is not admissible where the words of the will correctly refer to one charity, and there is no other charity which can properly be described by the same words: *Wilson v Squire* (1842) 1 Y & C Ch Cas 654. See also *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207, HL; cf CHARITIES vol 8 (2010) PARA 108.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/503. Evidence of the testator's habits.

503. Evidence of the testator's habits.

Evidence is not admissible in a court of construction directly to prove a mistake in a will in describing property or a donee¹; but where, on the construction of the words of the will, it is clear that there is a mistake, evidence of surrounding circumstances² becomes admissible to prove how the mistake arose, in order to identify the true subject³.

For this purpose, evidence is admitted of the testator's habits⁴, for example his practice of calling a certain person by a nickname⁵ or other name by which he was not commonly known⁶, but by which he is described in the will. Similarly, with regard to a description of property which is not accurately satisfied as ordinarily understood, evidence may be admitted of the testator's habit of dealing with certain property under that description and of its accuracy as he understood it⁷. The evidence admissible under this head does not, however, extend to direct evidence of the testator's intention⁸, or to evidence indicative of an improbability that the testator intended to benefit certain persons⁹. Such evidence is inadmissible except for the purpose of resolving an ambiguity¹⁰.

- 1 See PARA 477 ante.
- 2 See *Re Ray, Cant v Johnstone* [1916] 1 Ch 461; *Re Nicholl, Re Perkins, Nicholl v Perkins* (1920) 125 LT 62.
- 3 *Selwood v Mildmay* (1797) 3 Ves 306; *Lindgren v Lindgren* (1846) 9 Beav 358 (where it is explained that the doubts as to the soundness of *Selwood v Mildmay* supra, expressed in *Miller v Travers* (1832) 8 Bing 244 and *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363, were founded on a misapprehension). See also *Findlater v Lowe* [1904] 1 IR 519. In certain circumstances a will may now be rectified: see PARA 408 ante.
- 4 *Bernasconi v Atkinson* (1853) 10 Hare 345 at 349.
- 5 *Edge v Salisbury* (1749) Amb 70 at 71; *Goodinge v Goodinge* (1749) 1 Ves Sen 231; *Dowset v Sweet* (1753) Amb 175.
- 6 *Beaumont v Fell* (1723) 2 P Wms 141 (but as to this case see *Mostyn v Mostyn* (1854) 5 HL Cas 155 at 168); *Parsons v Parsons* (1791) 1 Ves 266; *Lee v Pain* (1844) 4 Hare 201 at 251; *Re Feltham's Will Trusts* (1855) 1 K & J 528; *Andrews v Andrews* (1885) 15 LR Ir 199, Ir CA; *Re Ofner, Samuel v Ofner* [1909] 1 Ch 60, CA. See also *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 368 per Lord Abinger CB. It seems, however, that this type of evidence should not be relied on where there is sufficient evidence of other circumstances to render the will intelligible: see *Blundell v Gladstone* (1841) 11 Sim 467 at 486; on appeal sub nom *Lord Camoys v Blundell* (1848) 1 HL Cas 778 at 785. Cf para 498 ante.
- 7 *Doe d Beach v Earl of Jersey* (1825) 3 B & C 870, HL; *Ricketts v Turquand* (1848) 1 HL Cas 472; *Webb v Byng* (1855) 1 K & J 580; *Castle v Fox* (1871) LR 11 Eq 542; *Jennings v Jennings* (1877) 1 LR Ir 552; *Re Vear, Vear v Vear* (1917) 62 Sol Jo 159.
- 8 *Sherratt v Mountford* (1873) 8 Ch App 928 at 931, CA, per Mellish LJ.
- 9 *Sherratt v Mountford* (1873) 8 Ch App 928 at 930, CA, per James LJ.
- 10 See PARAS 483 ante, 506-508 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/504. Effect of satisfactory evidence.

504. Effect of satisfactory evidence.

Where any subject of a gift is discovered which not only is within the words of the will, but exhausts the whole of those words, then the investigation must stop; the court takes that interpretation and does not go further¹, unless it is shown that another interpretation also exhausts the words² and that there is a latent ambiguity, sometimes called an equivocation³, arising from the circumstances⁴.

- 1 *Webb v Byng* (1855) 1 K & J 580 at 585 per Wood V-C.
- 2 *Sherratt v Mountford* (1873) 8 Ch App 928 at 930, CA.
- 3 Bacon's Maxims reg 23.
- 4 See PARAS 506-508 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/505. Effect of inconclusive evidence.

505. Effect of inconclusive evidence.

Where, after the admission of the evidence of the surrounding circumstances, the language of a testator who died before 1 January 1983¹ remains ambiguous or obscure, then, except in the case of a latent ambiguity², no further evidence, such as evidence of the testator's intention, or of declarations by him as to the persons or property he meant to include under a particular description, or of expressions of testamentary intentions in favour of particular persons who might be so described³, or of a mistake in the description, or of a mistake in copying the will, or otherwise, is admissible⁴, and the gift may be void for uncertainty⁵. Thus, as a legacy to a debtor is prima facie not a release to him of his debt⁶, extrinsic evidence is not admitted to show that by the legacy the testator intended to release the debt⁷.

However, in construing the will of a testator who died on or after 1 January 1983, whether an ambiguity is patent on the face of the testator's language, or whether it is latent⁸, being disclosed by evidence (other than evidence of the testator's intention) to be ambiguous in the light of surrounding circumstances, extrinsic evidence, including evidence of the testator's intention, is admissible⁹.

1 The date on which the Administration of Justice Act 1982 s 21 (see PARAS 483 ante, 507 post) came into force: see s 76(11). Nothing in s 21 affects the will of a testator who died before that date: s 73(6)(c).

2 As to what constitutes an ambiguity, and as to the evidence admissible in the case of latent ambiguity, see PARAS 506-508 post.

3 *Willis v Lucas* (1718) 10 Mod Rep 416 at 417; *Andrews v Dobson* (1788) 1 Cox Eq Cas 425; *Doe d Preedy v Holtom* (1835) 4 Ad & El 76; *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363; *Martin v Drinkwater* (1840) 2 Beav 215 at 218; *Doe d Hubbard v Hubbard* (1850) 15 QB 227; *Douglas v Fellows* (1853) Kay 114; *Bernasconi v Atkinson* (1853) 10 Hare 345 at 348; *Drake v Drake* (1860) 8 HL Cas 172 at 177; *M'Clure v Evans* (1861) 29 Beav 422; *Sullivan v Sullivan* (1870) IR 4 Eq 457 at 460; *Re Ingle's Trusts* (1871) LR 11 Eq 578 at 587; *Farrer v St Catherine's College, Cambridge* (1873) LR 16 Eq 19 at 21; *Charter v Charter* (1874) LR 7 HL 364 at 370, 376, 383; *Baker v Ker* (1882) 11 LR Ir 3 at 17; *Re Taylor, Cloak v Hammond* (1886) 34 ChD 255 at 258, CA; *Re Whorwood, Ogle v Lord Sherborne* (1887) 34 ChD 446 at 450, CA; *Re Ely, Tottenham v Ely* (1891) 65 LT 452 (as to this case see PARA 508 note 1 post); *Paton v Ormerod* [1892] P 247; *Downe v Sheffield* (1894) 71 LT 292; *Re Cheadle, Bishop v Holt* [1900] 2 Ch 620 at 624, CA; *Re Chenoweth, Ward v Dwelley* (1901) 17 TLR 515; *M'Hugh v M'Hugh* [1908] 1 IR 155 at 159.

4 Wigram's Extrinsic Evidence (5th Edn) p 91, Proposition VI. In the probate court, however, where the question relates to the act of making the will, such evidence is admissible in a doubtful or ambiguous case, at all events if the declarations were made before the will: *Doe d Ellis v Hardy* (1836) 1 Mood & R 525; *Doe d Shallcross v Palmer* (1851) 16 QB 747. See also *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514 at 547, [1967] 3 All ER 915 at 925, PC; and PARA 375 ante.

5 *Dowset v Sweet* (1753) Amb 175; *Thomas d Evans v Thomas* (1796) 6 Term Rep 671; *Doe d Hayter v Joinville* (1802) 3 East 172; *Richardson v Watson* (1833) 4 B & Ad 787; *Drake v Drake* (1860) 8 HL Cas 172; *Re Stephenson, Donaldson v Bamber* [1897] 1 Ch 75, CA. A charitable gift may not be void, but may be administered by means of a scheme: *Re Clergy Society* (1856) 2 K & J 615; *Re Bateman, Wallace v Mawdsley* (1911) 27 TLR 313. See also CHARITIES vol 8 (2010) PARA 178.

6 *Re Tinline, Elder v Tinline* (1912) 56 Sol Jo 310. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 488-489.

7 *Re Tinline, Elder v Tinline* (1912) 56 Sol Jo 310. See also *Selwin v Brown* (1735) 3 Bro Parl Cas 607, HL. Such evidence may be admitted, however, not to show intention, but to show some extraneous act constituting a release apart from the will: *Cross v Sprigg* (1849) 6 Hare 552 (on appeal (1850) 2 Mac & G 113); *Peace v Hains* (1853) 11 Hare 151 at 154.

8 As to the distinction between latent and patent ambiguity see PARA 508 post.

9 See the Administration of Justice Act 1982 s 21; and PARA 483 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/506. Extrinsic evidence of intention; death of testator before 1983.

506. Extrinsic evidence of intention; death of testator before 1983.

Where, in the will of a testator who died before 1 January 1983¹, there is a latent ambiguity² in the description of some person or thing, and evidence of the surrounding circumstances is insufficient to resolve the ambiguity, then, as a last resort³, evidence is admissible to prove the testator's declarations of his intention as to which of the persons and things so described was meant by him⁴. Such declarations need not be contemporaneous with the will, but may be of a prior or later date, and may have more or less weight according to the time and circumstances under which they were made⁵. In the case of a patent ambiguity no such evidence is admissible⁶.

If no such evidence is available, the uncertainty cannot be removed and the gift is void for uncertainty⁷.

1 The date on which the Administration of Justice Act 1982 s 21 (see PARAS 483 ante, 507 post) came into force: see s 76(11). Nothing in s 21 affects the will of any testator dying before that date: s 73(6)(c).

2 For the meaning of 'latent ambiguity' see PARA 508 post.

3 *Healy v Healy* (1875) IR 9 Eq 418 at 421 per Sullivan MR. See also Elphinstone's Introduction to Conveyancing (7th Edn) p 35; and PARA 508 post.

4 *Jones v Newman* (1750) 1 Wm Bl 60; *Doe d Morgan v Morgan* (1832) 1 Cr & M 235; *Doe d Gord v Needs* (1836) 2 M & W 129; *Fleming v Fleming* (1862) 1 H & C 242; *Phelan v Slattery* (1887) 19 LR Ir 177; *Re Ray, Cant v Johnstone* [1916] 1 Ch 461; *Robertson v Flynn* [1920] 1 IR 78, Ir CA (instructions for will looked at); *Re Cruse, Gass v Ingham* [1930] WN 206. See also *A-G v Hudson* (1720) 1 P Wms 674. Cf *Re Jeffery, Nussey v Jeffery* [1914] 1 Ch 375; and the cases in PARA 508 note 2 post. This former rule as to latent ambiguity is also stated in dicta in the following cases: *Lord Cheyney's Case* (1591) 5 Co Rep 68a at 68b (citing *Peynel v Peynel* (1373) YB 47 Edw 3, 16b, pl 29); *Lord Lansdown's Case* (1712) 10 Mod Rep 96 at 100; *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 368 per Lord Abinger CB; *Re Kilvert's Trusts* (1871) 7 Ch App 170 at 173 per James LJ; *Charter v Charter* (1874) LR 7 HL 364 at 370 per Lord Chelmsford, and at 377 per Lord Cairns LC. See also *Re Battie-Wrightson, Cecil v Battie-Wrightson* [1920] 2 Ch 330 (bequest of balance at 'the said bank', no bank having been named). As to the cases where the rule has been stated in relation to the interpretation of instruments inter vivos see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 209.

5 *Doe d Allen v Allen* (1840) 12 Ad & El 451 at 455. See also *Dwyer v Lysaght* (1812) 2 Ball & B 156 at 162; *Langham v Sanford* (1816) 19 Ves 641 at 649-650 per Lord Eldon LC.

6 See PARA 508 post.

7 *Re Jackson, Beattie v Murphy* [1933] Ch 237 at 242.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/507. Extrinsic evidence of intention; death of testator after 1982.

507. Extrinsic evidence of intention; death of testator after 1982.

In relation to testators who die on or after 1 January 1983¹, the circumstances in which extrinsic evidence of intention may be admitted have been statutorily defined². The position relating to latent ambiguity³ has been codified⁴, and the circumstances in which extrinsic evidence of

intention may be admitted have been extended so as to include patent ambiguity⁵ and meaninglessness⁶. In so far as such a testator's language in any part of the will is ambiguous on the face of it, or in so far as evidence (other than evidence of the testator's intention) shows that the language used in any part of it is ambiguous in the light of surrounding circumstances, extrinsic evidence, including evidence of the testator's intention, may now be admitted to assist in its interpretation⁷.

1 le the date on which the Administration of Justice Act 1982 s 21 (see the text and notes 3-6 infra) came into force: see s 76(11). Nothing in s 21 affects the will of any testator dying before that date: s 73(6)(c).

2 le by *ibid* s 21: see the text and notes 3-6 infra. See also the cases cited in PARA 508 note 11 post.

3 For the meaning of 'latent ambiguity' see PARA 508 post.

4 See the Administration of Justice Act 1982 s 21(1)(c), (2); and PARA 508 post.

5 See *ibid* s 21(1)(b), (2). For the meaning of 'patent ambiguity' see PARA 508 post.

6 See *ibid* s 21(1)(a), (2). See also PARA 483 ante.

7 See *ibid* s 21(1)(b), (c), (2). See also PARA 483 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iii) Evidence for Purposes of Identification/508. Meanings of 'latent ambiguity' and 'patent ambiguity'.

508. Meanings of 'latent ambiguity' and 'patent ambiguity'.

For the purpose of determining whether a latent ambiguity arises on the will of a testator dying before 1 January 1983, the following principles apply.

A latent ambiguity arises when the description in the will, considered in the light of the context, is on the face of it apt to describe and determine, without obscurity at the time when the subject is to be ascertained¹, any of two or more different subjects, either accurately, or subject to inaccuracies such as blanks left in the description, or words which have to be rejected as a false description not applying to any one², or which are otherwise negligible³. Where the donee is described by a forename, and there are found two persons, one having that name only and the other having that name with others, both are treated as answering the description in the will with sufficient accuracy, and a latent ambiguity arises⁴. A latent ambiguity does not arise where part of the description applies to one subject and another part to another subject⁵; or where from the context of the whole will⁶ or by the aid of any rule of construction applicable to the will⁷, such as the presumption as to repeated words⁸ or as to legitimacy⁹, or from the circumstances of the case properly admissible in evidence¹⁰, it can be gathered which of the different subjects was intended.

It is not clear whether the above principles apply for the purpose of determining whether the language used in any part of the will of a testator dying on or after 1 January 1983 is ambiguous for the purposes of the new statutory rule¹¹.

A latent ambiguity must be distinguished from a patent ambiguity, which arises where the description is on the face of it indefinite and insufficiently clear to determine any subject, as, for example, where there is a gift to 'one of the sons' of a named person who has more than one son¹². In the construction of the will of a testator who died before 1 January 1983¹³, extrinsic evidence of intention is not admissible to resolve such an ambiguity¹⁴, but it is admissible in the case of the will of a testator dying on or after that date¹⁵.

1 As to the rules of construction relating to the time for ascertaining the property given see PARA 573 post; and as to the time for ascertaining the donee see PARA 590 et seq post. Where a donee is described by name, and there has been a person in existence known to the testator answering to the exact description of the donee, while at the date of the will or of the death of the testator there is no such person, extrinsic evidence is admissible to prove not only the testator's intimacy with a person who exists to whom a sufficient part of the description is applicable, but even his intention to make the gift to that person: *Re Halston, Ewen v Halston* [1912] 1 Ch 435, not following *Re Ely, Tottenham v Ely* (1891) 65 LT 452 (which had been disapproved by Farwell LJ in *Re Ofner, Samuel v Ofner* [1909] 1 Ch 60 at 63, CA), and applying *Re Blackman* (1852) 16 Beav 377. In *Re Ely, Tottenham v Ely* supra the evidence relied on merely went to prove intention, and was held inadmissible as such: see *Re Loughlin, Acheson v O'Meara* [1906] VLR 597 at 601, 603 (where *Re Ely, Tottenham v Ely* supra is explained).

2 *Price v Page* (1799) 4 Ves 680; *Careless v Careless* (1816) 1 Mer 384 ('to Robert C my nephew the son of Joseph C', the testator having two nephews Robert, and no brother Joseph); *Still v Hoste* (1821) 6 Madd 192 (name wrong). These three cases were explained in *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 370 per Lord Abinger CB as cases where the inaccurate part of the description was either a mere blank or applicable to no person at all. See also *Garner v Garner* (1860) 29 Beav 114 (a settlement on 'J G of S and E his wife', there being a J G of B whose wife's name was E a niece of the settlor, and a J G of S, whose wife was H); *Re Hubbuck* [1905] P 129 ('my granddaughter . . .', there being three); *Re Ray, Cant v Johnstone* [1916] 1 Ch 461; *Re Brady, Wylie v Radcliffe* (1919) 147 LT Jo 235; *Re Gowenlock, Public Trustee v Gowenlock* (1934) 177 LT Jo 95.

3 *Henderson v Henderson* [1905] 1 IR 353.

4 *Bennett v Marshall* (1856) 2 K & J 740; *Re Wolverton Mortgaged Estates* (1877) 7 ChD 197 at 199 (where, however, the decision is also sufficiently grounded on evidence of surrounding circumstances). See also *Re Halston, Ewen v Halston* [1912] 1 Ch 435.

5 *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363; *Bernasconi v Atkinson* (1853) 10 Hare 345 at 348-349; *Re Chappell* [1894] P 98. In *Re Brake* (1881) 6 PD 217, the evidence of intention was not relied on.

6 *Doe d Westlake v Westlake* (1820) 4 B & Ald 57 (to 'M W my brother and S W my brother's son', there being two persons S W, sons of brothers of the testator).

7 See, however, *Re Freeman's Will Trusts* (10 July 1987, unreported) (cited in note 11 infra).

8 *Webber v Corbett* (1873) LR 16 Eq 515. See also PARA 540 post. Cf *Healy v Healy* (1875) IR 9 Eq 418. In *Doe d Morgan v Morgan* (1832) 1 Cr & M 235, a similar case, this presumption was not alluded to, and evidence of intention was admitted; and in *Phelan v Slattery* (1887) 19 LR Ir 177, the presumption was excluded by the context, and evidence of intention was admitted.

9 *Re Fish, Ingham v Rayner* [1894] 2 Ch 83, CA; distinguished in *Re Jackson, Beattie v Murphy* [1933] Ch 237 (where a latent ambiguity arose because two legitimate persons both satisfied the description and, extrinsic evidence being then admitted, it could extend to the claim of an illegitimate person). In *Re Ashton* [1892] P 83, this presumption was excluded by the terms of the will. As to the presumption as to legitimacy see PARA 638 post. In *Grant v Grant* (1870) LR 5 CP 380 (on appeal LR 5 CP 727, Ex Ch), where the devise was to 'my nephew J G', and the testator had both a nephew and a nephew by affinity of that name, evidence was held admissible to show the relation in which they respectively stood to the testator, and that he did not know of the existence of the former, but the question of the admissibility of evidence of intention was not decided. In *Wells v Wells* (1874) LR 18 Eq 504 at 506 per Jessel MR, and in *Merrill v Morton* (1881) 17 ChD 382 at 386 per Malins V-C, the decision in *Grant v Grant* supra was dissented from on the ground that 'nephew' in its ordinary meaning includes only a nephew by consanguinity. See, however, *Re Ashton* supra at 86-87 per Jeune J; *Re Fish, Ingham v Rayner* supra at 87 per AL Smith LJ. As to the general rule with regard to the ordinary meaning of words see PARA 532 post; and as to the general rule with regard to relationships see PARA 619 post. As to the question of legitimacy with regard to dispositions after 31 December 1969 see PARAS 643-644 post.

10 *Douglas v Fellows* (1853) Kay 114 at 120 per Wood V-C, citing *Fox v Collins* (1761) 2 Eden 107 (bequest to 'the said A C', there being two of the name mentioned in the will); *Re Cheadle, Bishop v Holt* [1900] 2 Ch 620, CA (bequest of 'my 140 shares', where the testatrix had 240 partly and 40 fully paid up).

11 In *Re Freeman's Will Trusts* (10 July 1987, unreported), Sir Nicholas Browne-Wilkinson V-C rejected the submission that the Administration of Justice Act 1982 s 21(1)(c), (2) (see PARA 483 ante) could only apply in a case where it would be impossible otherwise to decide the meaning of the will and expressed the view that extrinsic evidence of intention was admissible both under the old law and under the statute not only in cases where it was otherwise impossible to determine the testator's intention but also in cases where it was difficult to do so. A similarly liberal approach was adopted in *Re Benham's Will Trusts* [1995] STC 210; *Watson v National Children's Homes* [1995] 37 LS Gaz R 24. Cf *Re Williams, Wiles v Madgin* [1985] 1 All ER 964, [1985] 1 WLR 905 (decided under the Administration of Justice Act 1982 s 21(1)(b), (2); Nicholls J took a broad view of

what constitutes an ambiguity for the purposes of s 21). By contrast, in *Cook v Saxlova* (18 October 1988, unreported), Millett J expressed the view that the admissibility of extrinsic evidence of intention under the Administration of Justice Act 1982 s 21(1)(c), (2) (as under the former law) did not depend on the difficulty of the question to be answered, nor was it enough that the language used might be capable of more than one meaning or that it might be differently construed by different judges; it was essential that the language of the will should still have more than one meaning after the process of construction was complete. See also *Hodgson v Clare* [1999] All ER (D) 359, sub nom *Re Owen*, *Hodgson v Clare* [2002] WTLR 619.

12 The fact that the ambiguity appears on the face of the will, as where the two persons who may answer the description are both named in the will, does not prevent the ambiguity from being latent for this purpose: *Doe d Gord v Needs* (1836) 2 M & W 129 at 141 (following *Doe d Morgan v Morgan* (1832) 1 Cr & M 235).

13 Is the date on which the Administration of Justice Act 1982 s 21 (see PARA 483 ante) came into force: s 76(11). Nothing in s 21 affects the will of any testator dying before that date: s 76(6)(c). As to the wills of testators dying on or after that date see PARA 507 ante.

14 *Sir Litton Strode v Lady Russel and Lady Falkland* (1707) 2 Vern 621 at 624 per Tracy J; and see PARA 557 post.

15 See the Administration of Justice Act 1982 s 21(1)(b), (2); and PARA 507 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iv) Evidence of Secret Trusts/509. Evidence of secret trusts.

(iv) Evidence of Secret Trusts

509. Evidence of secret trusts.

In certain cases evidence is admissible to prove matters not disclosed by the will which are binding on a donee under an express or implied undertaking on his part made with the testator. In such cases evidence is admitted, not to show the testator's intention, but to prove the existence of an obligation, in the nature of a trust¹, accepted by and binding on the donee². Historically such evidence was only admitted to prevent fraud on the donee's part³, but nowadays fraud is not an essential element, and in the absence of actual fraud the standard of proof required is no more than the ordinary civil standard of proof required for the establishment of an ordinary trust⁴. Such evidence is admissible, even though the will expressly states that the gift is to the donee beneficially⁵; but where on the construction of the will the gift is a fiduciary one, no evidence is admissible to show that the donee takes any part of the gift beneficially⁶.

If the evidence discloses a secret trust, the beneficiaries take under that trust and not under the will⁷; accordingly, the trust does not fail merely because the beneficiary under it is an attesting witness to the will⁸, or predeceases the testator⁹.

1 Is certain language in imperative form, certain subject matter and certain objects: *Kasperbauer v Griffith* [2000] WTLR 333, CA. As to the creation of secret trusts generally see TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

2 *Re Spencer's Will* (1887) 57 LT 519 at 521, CA; *Re Ellis, Owen v Bentley* (1918) 53 ILT 6. See also TRUSTS vol 48 (2007 Reissue) PARA 672 et seq. The test in such cases is to consider the case as unaffected by the Wills Act 1837, and then to inquire whether a trust or obligation has been imposed by the testator and accepted by the donee such as a court of equity would enforce: *Jones v Badley* (1868) 3 Ch App 362 at 364, CA, per Lord Cairns LC. See also *Gold v Hill* [1999] 1 FLR 54, [1998] Fam Law 664 (in which a person in whose favour a nomination had been made under a life insurance policy was held by analogy with the doctrine of secret trusts to hold the moneys as constructive trustee for the deceased's cohabitant).

3 *McCormick v Grogan* (1869) LR 4 HL 82 at 89, 97; *Re Stead, Witham v Andrew* [1900] 1 Ch 237; *Re Pitt Rivers, Scott v Pitt Rivers* [1902] 1 Ch 403 at 407, CA, per Vaughan Williams LJ; *Tharp v Tharp* [1916] 1 Ch 142;

Re Snowden, Smith v Spowage [1979] Ch 528, [1979] 2 All ER 172. See also TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

4 *Re Snowden, Smith v Spowage* [1979] Ch 528, [1979] 2 All ER 172 (not following *Ottaway v Norman* [1972] Ch 698, [1971] 2 All ER 1325 on this point). See also *Rufenack v Hope Mission* 2002 ABQB 1055, (2003-04) 6 ITELR 1.

5 *Russell v Jackson* (1852) 10 Hare 204; *Re Spencer's Will* (1887) 57 LT 519, CA.

6 *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA; *Re Karsten, Edwards v Moore* [1953] 72 NZLR 456, NZ CA; *Re Pugh's Will Trusts, Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262.

7 *O'Brien v Condon* [1905] 1 IR 51; *Re Young, Young v Young* [1951] Ch 344 at 351, [1950] 2 All ER 1245 at 1251. See also *Cullen v A-G for Ireland* (1866) LR 1 HL 190 at 198; and TRUSTS vol 48 (2007 Reissue) PARA 672 et seq. For the purpose of administration, however, property comprised in a secret trust may fall to be treated in the same manner as if it had been included in a specific bequest in the will: *Re Maddock, Llewellyn v Washington* [1902] 2 Ch 220, CA.

8 *Re Young, Young v Young* [1951] Ch 344, [1950] 2 All ER 1245 (not following *Re Fleetwood* (1880) 15 ChD 594 on this point). See also *O'Brien v Condon* [1905] 1 IR 51. As the person named in the will as legatee takes no beneficial interest by reason of the existence of the trust, the legacy is not invalidated under the Wills Act 1837 s 15 (see PARA 343 ante), by his attesting the will: see *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v Barry* [1936] Ch 520, [1936] 2 All ER 93.

9 *Re Gardner, Huey v Cunningham* [1923] 2 Ch 230. As to the effect of the trustee predeceasing the testator see *Re Maddock, Llewellyn v Washington* [1902] 2 Ch 220, CA; and TRUSTS vol 48 (2007 Reissue) PARA 672.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iv) Evidence of Secret Trusts/510. Fully secret trusts.

510. Fully secret trusts.

Where on the face of the will the gift is an absolute one¹, but it can be proved² that either before³ or after⁴ the date of the will, but during the testator's lifetime⁵, the donee received from the testator a communication of certain trusts or conditions to be attached to the gift⁶ and to be binding on the donee⁷, and that the donee accepted the gift on those trusts and conditions, either by his express agreement or by his silence⁸, and thereby induced the testator to make the gift, or to leave the gift already made unrevoked, then evidence of those trusts or conditions is admissible, except in so far as such evidence would contradict the will⁹.

1 *Burney v Macdonald* (1845) 15 Sim 6; *Russell v Jackson* (1852) 10 Hare 204; *Re Spencer's Will* (1887) 57 LT 519, CA.

2 The proof may consist of an admission by the donee (*Re Maddock, Llewellyn v Washington* [1902] 2 Ch 220, CA; *Re Huxtable, Huxtable v Crawford* [1902] 2 Ch 793, CA) or evidence from another source (*Podmore v Gunning* (1836) 7 Sim 644), but it must prove acceptance of the trust by the donee (*French v French* [1902] 1 IR 172, HL; *Le Page v Gardom* (1915) 84 LJ Ch 749, HL; *Re Gardner, Huey v Cunningham* [1920] 2 Ch 523, CA; *Re Pitt Rivers, Scott v Pitt Rivers* [1902] 1 Ch 403; and see *Re Crawshay, Crawshay v Crawshay* (1890) 43 ChD 615 at 625).

3 *Re Applebee, Leveson v Beales* [1891] 3 Ch 422 at 430-431.

4 *Moss v Cooper* (1861) 1 John & H 352 at 366 per Wood V-C ('a bargain before the will is not at all essential'). Cf *Wekett v Raby* (1724) 2 Bro Parl Cas 386, HL; *Morrison v M'Ferran* [1901] 1 IR 360; *French v French* [1902] 1 IR 230; *Re Gardner, Huey v Cunningham* [1920] 2 Ch 523 at 532.

5 Communication after his death is not sufficient: *Re Boyes, Boyes v Carritt* (1884) 26 ChD 531; *Re Shields, Corbould-Ellis v Dales* [1912] 1 Ch 591; *Re Louis, Louis v Treloar* (1916) 32 TLR 313. See also TRUSTS vol 48 (2007 Reissue) PARA 672.

6 The method by which the testator's intentions are to be carried out is not material: see *Ottaway v Norman* [1972] Ch 698, [1971] 3 All ER 1325 (donee to make will in favour of another).

7 For cases where the communications were not intended to be binding see *Podmore v Gunning* (1836) 7 Sim 644; *Re Pitt Rivers*, *Scott v Pitt Rivers* [1902] 1 Ch 403, CA; *Sullivan v Sullivan* [1903] 1 IR 193; *Re Falkiner, Mead v Smith* [1924] 1 Ch 88; *Re Barton*, *Barton v Bourne* (1932) 48 TLR 205; *Re Stirling*, *Union Bank of Scotland Ltd v Stirling* [1954] 2 All ER 113, [1954] 1 WLR 763; *Re Snowden*, *Smith v Spowage* [1979] Ch 528, [1979] 2 All ER 172. See also TRUSTS vol 48 (2007 Reissue) PARAS 672, 676.

8 The acceptance may be made expressly or silently, as where the donee does not dissent on the communication being made to him: see *Russell v Jackson* (1852) 10 Hare 204; *Moss v Cooper* (1861) 1 John & H 352 at 370-371; and TRUSTS vol 48 (2007 Reissue) PARAS 674-675. In the latter case, however, the evidence of acceptance must leave no doubt in the mind of the court: *French v French* [1902] 1 IR 172 at 213, HL, per Walker LJ; *Re Williams*, *Williams v All Souls*, *Hastings (Parochial Church Council)* [1933] Ch 244.

9 *Re Huxtable*, *Huxtable v Crawford* [1902] 2 Ch 793, CA; *Re Ellis*, *Owen v Bentley* (1918) 53 ILT 6; *Re Keen*, *Evershed v Griffiths* [1937] Ch 236 at 247, [1937] 1 All ER 452 at 459, CA. See also *Re Rees*, *Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003; *Re Spence*, *Quick v Ackner* [1949] WN 237.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(2) ADMISSIBILITY OF EVIDENCE/(iv) Evidence of Secret Trusts/511. Partly secret trusts.

511. Partly secret trusts.

Where on the construction of a will a gift to a donee is not absolute, but subject to trusts or conditions which are not disclosed by the will¹, evidence of the trusts or conditions is admissible only if they were declared and communicated to the trustee (or to one at least of the trustees where there are several²) and accepted by him before or at the execution of the will³. Where by a subsequent will or codicil the testator increases a legacy which is already bound by a secret trust, but does not before executing the subsequent will or codicil communicate the increase to the trustee, the trust is valid as to the amount of the original legacy only⁴.

1 *Blackwell v Blackwell* [1929] AC 318, HL. The trusts must be contained in some document in existence at the date of the will, or be declared orally and accepted by the trustee before or at the date of the will: *Crook v Brooking* (1688) 2 Vern 50, 106; *Pring v Pring* (1689) 2 Vern 99; *Smith v Attersoll* (1826) 1 Russ 266; *Re Fleetwood*, *Sidgreaves v Brewer* (1880) 15 ChD 594; *Re Huxtable*, *Huxtable v Crawford* [1902] 2 Ch 793, CA; *Re Ellis*, *Owen v Bentley* (1918) 53 ILT 6. See also *Johnson v Ball* (1851) 5 De G & Sm 85 (explained in *Re Fleetwood*, *Sidgreaves v Brewer* supra at 603-604); and the text and note 3 infra.

2 See *Re Gardom*, *Le Page v A-G* [1914] 1 Ch 662 at 673.

3 *Re Keen*, *Evershed v Griffiths* [1937] Ch 236, [1937] 1 All ER 452, CA. See also *Johnson v Ball* (1851) 5 De G & Sm 85; *Scott v Brownrigg* (1881) 9 LR 1r 246 at 261; *Re Boyes* (1884) 26 ChD 531 at 535; *Balfe v Halpenny* [1904] 1 IR 486; *Re Karsten*, *Edwards v Moore* [1953] 72 NZLR 456, NZ CA; *Re Bateman's Will Trusts*, *Brierley v Perry* [1970] 3 All ER 817, [1970] 1 WLR 1463. Cf *Re Hawksley's Settlement*, *Black v Tidy* [1934] Ch 384 at 399; and TRUSTS vol 48 (2007 Reissue) PARA 677.

4 *Re Cooper*, *Le Neve Foster v National Provincial Bank Ltd* [1939] Ch 811, [1939] 3 All ER 586, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/A. ASCERTAINMENT OF INTENTION/512. Basic principles of construction.

(3) PRINCIPLES OF CONSTRUCTION

(i) In general

A. ASCERTAINMENT OF INTENTION

512. Basic principles of construction.

There have been recent changes in the approach to the construction of legal documents. The decisions which introduced this change concerned the construction of commercial agreements but they affect the approach to the construction of legal documents generally¹. The principles as they apply to wills may be briefly stated as follows:

- 53 (1) interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available at the time the will was made²;
- 54 (2) the admissible background knowledge includes 'absolutely anything which would have affected the way in which the language of the will would have been understood by a reasonable man'³, provided that it is relevant⁴;
- 55 (3) the law excludes from the admissible background declarations of subjective intent⁵;
- 56 (4) the meaning which a will would convey to a reasonable man is not the same thing as the meaning of its words: the meaning of words is a matter of dictionaries and grammars; the meaning of the will is what having regard to the relevant background the testator would reasonably have been understood to mean; the background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even to conclude that the testator must, for whatever reason, have used the wrong words or syntax⁶;
- 57 (5) the 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents; on the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the testator an intention which he plainly could not have had⁷.

Many of the more technical rules formerly applied in the construction of wills may need to be re-examined in the light of the new approach.

1 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* supra at 776-777 and 376-377, Lord Hoffmann specifically referred to the cases on the admissibility of extrinsic evidence to construe wills. For an example of the more modern approach to construction in the context of wills see *Blech v Blech* [2002] WTLR 483.

2 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 113, [1998] 1 WLR 896 at 912, HL, per Lord Hoffmann.

3 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 113, [1998] 1 WLR 896 at 912-913, HL, per Lord Hoffmann.

4 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 at [39], [2002] 1 AC 251 at [39], [2001] 1 All ER 961 at [39], per Lord Hoffmann.

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 113-114, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

6 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

⁷ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/A. ASCERTAINMENT OF INTENTION/513. Main principle of construction.

513. Main principle of construction.

The cardinal rule of English law as to the effect of a will is that the testator's intention, as declared by him and apparent¹ in the words of his will in the light of the relevant background, has effect given to it, so far and as nearly as may be consistent with law². The main principle of construction is that the testator's intention is collected from a consideration of the whole will³ taken in connection with any evidence properly admissible⁴, and the meaning of the will and of every part of it is determined according to that intention⁵.

For this purpose, the will and all the codicils to it are construed together as one testamentary disposition⁶, but not as one document⁷, and the testator's intention is gathered from the whole disposition⁸. Where two properties are given by the will on similar limitations, a variation of the limitations by a codicil in respect of one property only will not affect the gift of the other⁹, unless it appears that the testator intended the two properties to be united¹⁰. Where no such intention appears, it is not to be inferred from the fact that, under the will, the two properties were devised on similar limitations¹¹.

The testator's intention, as expressed in the will, may be overridden by statutory provisions which affect the property¹².

¹ *Papillion v Voice* (1728) Kel W 27 at 32.

² *Manning's Case* (1609) 8 Co Rep 94b at 95b; *Blamford v Blamford* (1615) 3 Bulst 98 at 103, 107; *King v Melling* (1671) 1 Vent 225 at 228 per Hale CJ ('the law to expound the testament'); *Smith v Clever* (1688) 2 Vern 59 at 60; *Doe d Long v Laming* (1760) 2 Burr 1100 at 1112 per Wilmot J ('the polestar for the direction of devises'); *Tothill v Pitt* (1766) 1 Madd 488 at 509; *Roe d Doson v Grew* (1767) Wilm 272 at 274; *Hodgson v Ambrose* (1780) 1 Doug KB 337 at 341 per Buller J ('the first and great rule . . . to which all others must bend'); *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 181 ('the governing principle'); *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 226 ('the great principle'); *Baker v Baker* (1858) 6 HL Cas 616 at 622; *Webber v Stanley* (1864) 16 CBNS 698 at 752 ('the purpose of construction is, to effectuate the intention of the testator expressed in the words of the will'); *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 228, CA; *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369 at 373, CA, per Lindley LJ; *Perrin v Morgan* [1943] AC 399 at 406, [1943] 1 All ER 187 at 190, HL, per Viscount Simon LC, at 195 and 416 per Lord Thankerton, and at 197 and 420 per Lord Romer ('the cardinal rule'). Cf DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 166.

³ *Baddeley v Leppingwell* (1764) 3 Burr 1533 at 1541; *Thellusson v Woodford, Woodford v Thellusson* (1799) 4 Ves 227 at 329; *Martin v Lee* (1861) 14 Moo PCC 142 at 153; *Crumpe v Crumpe* [1900] AC 127 at 130, HL, per Earl of Halsbury LC, and at 132 per Lord Ashbourne. In *Aitken's Trustees v Aitken* 1970 SC 28 at 35, HL, Lord Upjohn held that the duty of the courts is 'to give effect to the intentions of the testator by construing his language, however imperfect or inelegant it may be, robustly and in a commonsense way, trying, so far as is possible, to mould his language so as to do as little violence to it as possible'.

⁴ *Stanley v Stanley* (1862) 2 John & H 491 at 513; *Re Cozens, Miles v Wilson* [1903] 1 Ch 138 at 143.

⁵ *Manning's Case* (1609) 8 Co Rep 94b at 95b ('the intention of the devisor expressed in his will is the best expositor, director, and disposer of his words'); *Doe d Long v Laming* (1760) 2 Burr 1100 at 1112. The statement that 'a testator only means what he says in express words' (*Bent v Cullen* (1871) 6 Ch App 235 at 239 per Lord Hatherley) seems to go rather too far: see PARA 512 ante. The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words but also to control the sense even of clear words and to supply the place of express words, in cases of difficulty or ambiguity (*Re Haygarth, Wickham v Haygarth* [1913] 2 Ch 9 at 15 per Joyce J (citing Hawkins on Wills (2nd Edn) p 6); *Re Patterson, Dunlop v Greer* [1899] 1 IR 324), but nothing is more fallacious than endeavouring first of all to find out the testator's intention and then to

construe the words of the will with reference to that supposed intention (*Taaffe v Conmee* (1862) 10 HL Cas 64 at 85 per Lord Cranworth).

6 *Phipps v Earl Anglesey* (1751) 7 Bro Parl Cas 443 at 452, HL; *Crosbie v Macdoul* (1799) 4 Ves 610; *Darley v Martin* (1853) 13 CB 683; *Green v Tribe* (1878) 9 ChD 231; *Re Wilcock, Kay v Dewhurst* [1898] 1 Ch 95; *Morley v Rennoldson* [1895] 1 Ch 449, CA; *Re Hardyman, Teesdale v McClintock* [1925] Ch 287. See also *Choa Eng Wan v Choa Giang Tee* [1923] AC 469 at 473, PC. As to identifying a will referred to in a codicil as a 'former will' see *Re White, Knight v Briggs* [1925] Ch 179. An improperly attested codicil may, if necessary, be referred to: *Green v Marsden* (1853) 1 Drew 646. As to construing the will and codicils together see PARA 481 ante.

7 A codicil is not, as a general rule, to be taken as part of the will for all intents and purposes (*Re Towry's Settled Estate, Dallas v Towry* (1889) 41 ChD 64 at 74, CA), and legacies given by a codicil might not be free of tax like legacies given by the will (*Re Trinder, Sheppard v Prance* (1911) 56 Sol Jo 74; but see *Crosbie v Macdoul* (1799) 4 Ves 610 at 616). On the construction of the will and codicils taken together, the words 'this my will' refer to the testamentary disposition constituted by the will and codicils at the testator's death: *Re Smith, Prada v Vandroy* [1916] 2 Ch 368, CA (disapproving *Bonner v Bonner* (1807) 13 Ves 379; *Henwood v Overend* (1815) 1 Mer 23).

8 The same principles apply to the construction of a codicil as of a will. As to legacies given by a codicil in addition to or substitution for those given by a will see PARAS 685-687 post.

9 *Martineau v Briggs* (1875) 23 WR 889, HL.

10 *Lord Carrington v Payne* (1800) 5 Ves 404; *Re Towry's Settled Estate, Dallas v Towry* (1889) 41 ChD 64, CA.

11 *Martineau v Briggs* (1875) 23 WR 889, HL. See also *Re Bund, Cruikshank v Willis* [1929] 2 Ch 455. As to the effect of such dispositions in a will and a subsequent disposition of one property by deed see *Re Whitburn, Whitburn v Christie* [1923] 1 Ch 332.

12 Eg the statutory trusts formerly imposed in the case of undivided shares in land (*Re Flint, Flint v Flint* [1927] 1 Ch 570) unless the provisions of the will could be treated as incidental to the statutory trusts (*Re Pedley, Wallace v Wallace* [1927] 2 Ch 168). All trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share now has an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66. In *Re Ricarde-Seaver's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Sandbrook* [1936] 1 All ER 580, the provisions of the will were held to be overridden by the terms of the Trustee Act 1925 s 31 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 63 et seq); but in *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA, and *Re Ransome's Will Trusts, Moberley v Ransome* [1957] Ch 348, [1957] 1 All ER 690, these terms were held to be subject to a contrary direction in the will (see the Trustee Act 1925 s 69(2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 63; TRUSTS vol 48 (2007 Reissue) PARA 603).

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514. Ascertaining intention.

The first duty¹ of a court of construction is to ascertain the language of the will, to read the words used and to ascertain the testator's intention from them². Unexpressed mental intentions are irrelevant³. Where the will must be in writing, the only question is what is the meaning of the words used in that writing⁴. The expressed intention is in all cases taken as the actual intention, whatever the testator in fact intended⁵, and as a general rule the court may not give effect to any intention which is not expressed or implied in the language of the will⁶.

1 *Ongley v Chambers* (1824) 8 Moore CP 665 at 685 (applying *Hill v Grange* (1556) 1 Plowd 164 at 170 ('the office of the judges')); *Macpherson v Macpherson* (1852) 16 Jur 847 at 848, HL; *Martin v Lee* (1861) 14 Moo PCC

142 at 153 per Turner LJ ('the paramount duty of the courts'); *Enohin v Wylie* (1862) 10 HL Cas 1 at 26; *Comiskey v Bowring-Hanbury* [1905] AC 84 at 91, HL, per Lord Davey. See also PARA 479 ante.

2 *Re Freeman, Hope v Freeman* [1910] 1 Ch 681 at 691, CA, per Buckley LJ; *Re Mellor, Dodgson v Ashworth* (1912) 56 Sol Jo 596. See also PARA 476 ante.

3 *Doe d Gwillim v Gwillim* (1833) 5 B & Ad 122 at 129 per Parke J.

4 *Grey v Pearson* (1857) 6 HL Cas 61 at 106 per Lord Wensleydale; *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 114 per Lord Wensleydale (cited in *Re Rowland, Smith v Russell* [1963] Ch 1 at 11, [1962] 2 All ER 837 at 842, CA, per Harman LJ). See also *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876 per Lord Wensleydale. As to the requirement of writing see PARA 351 ante.

5 *Simpson v Foxon* [1907] P 54 at 57 per Bargrave Deane J.

6 *Scalé v Rawlins* [1892] AC 342 at 343-344, HL, per Lord Halsbury, and at 344 per Lord Watson. See also *Livesey v Livesey* (1849) 2 HL Cas 419 at 438 per Lord Campbell; *Grover v Burningham* (1850) 5 Exch 184 at 193 (cited with approval in *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 235, [1960] 3 All ER 744 at 747); *Wilson v O'Leary* (1872) 7 Ch App 448 at 453, CA; *Re Duke of Cleveland's Settled Estates* [1893] 3 Ch 244 at 251, CA; *Rose v Rose* [1897] 1 IR 9 at 56, Ir CA; *Re Harpur's Will Trusts, Haller v A-G* [1962] Ch 78 at 94, [1961] 3 All ER 588 at 594, CA, per Harman LJ. In certain circumstances extrinsic evidence, including extrinsic evidence of intention, is admissible: see PARAS 483, 506-507 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/A. ASCERTAINMENT OF INTENTION/515. Unimportance of form if intention shown.

515. Unimportance of form if intention shown.

As a rule, a will is generally construed in the same manner as any other document¹, except that, in the case of a will, if the intention is shown, the mode of expression of that intention² and the form and language of the will are unimportant³. Thus the want of the technical words which are necessary in some instruments for the purpose of giving expression to intention⁴, or any error in grammar⁵, or the want or inaccuracy of punctuation marks⁶, is immaterial; in all such cases a benevolent construction is adopted⁷. Whether the will appears to have been drawn by the testator himself or by a skilled draftsman on his behalf is taken into consideration⁸, and this may guide the court as to the force to be given to technical words⁹. In the former case the testator will be supposed to use words in a popular and not in a legal sense¹⁰, although in both cases the same principles of construction are applicable¹¹.

1 *Ralph v Carrick* (1879) 11 ChD 873 at 876, CA, per Brett LJ. As to the construction of other documents see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

2 *Cave v Cave* (1762) 2 Eden 139 at 144. See also PARA 512 ante.

3 For an exception see the Law of Property Act 1925 s 130(1) (repealed); para 668 et seq post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

4 *Strong d Cummin v Cummin* (1759) 2 Burr 767 at 770; *Ralph v Carrick* (1879) 11 ChD 873, CA; *Taylor v Shaw, Re Jones* (1920) 89 LJPC 124. See also PARA 660 et seq post.

5 See *Jones v Morgan* (1773), cited in 4 Bro CC at 460 (the court must adopt the testator's intent no matter what words the testator has made use of); *Eden v Wilson* (1852) 4 HL Cas 257 at 284; *Re Norman's Trust* (1853) 3 De GM & G 965 at 967-968; *Hall v Warren* (1861) 9 HL Cas 420 at 427. At the same time, one must not divorce language from its ordinary meaning by introducing a suggestion of false grammar: *Gorringe v Mahlstetd* [1907] AC 225 at 227, HL per Earl of Halsbury.

6 *Gordon v Gordon* (1871) LR 5 HL 254 at 276 (approving *Sanford v Raikes* (1816) 1 Mer 646 at 651). See also *Gauntlett v Carter* (1853) 17 Beav 586; *Re Campbell, M'Cabe v Campbell* [1918] 1 IR 429. The court may consider the punctuation used: see PARA 488 ante.

7 See Co Litt 112a, 112b; *Jones v Price* (1841) 11 Sim 557 at 565; *Lang v Pugh* (1842) 1 Y & C Ch Cas 718 at 725; *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 41; *Re Speakman, Unsworth v Speakman* (1876) 4 ChD 620 at 625. The testator is considered to have acted without legal advice: see *Lewis v Rees* (1856) 3 K & J 132 at 147 per Page Wood V-C; *Re Warren's Trusts* (1884) 26 ChD 208 at 217 (both cases on deeds and comparing the strict construction in the case of deeds with the more lenient construction of wills). See also SETTLEMENTS vol 42 (Reissue) PARA 929.

8 *Richards v Davies* (1862) 13 CBNS 69 at 86 (affd 13 CBNS 861, Ex Ch); *Re Dayrell, Hastie v Dayrell* [1904] 2 Ch 496 at 499. See also *Perrin v Morgan* [1943] AC 399 at 405, [1943] 1 All ER 187 at 189, HL, per Viscount Simon LC.

9 *Thellusson v Lord Rendlesham, Thellusson v Thellusson, Hare v Robarts* (1859) 7 HL Cas 429 at 486, 490, 498, 504.

10 *Forth v Chapman* (1720) 1 P Wms 663 at 666; *Re Taylor, Taylor v Tweedie* [1923] 1 Ch 99 at 105, CA.

11 *Weale v Ollive (No 2)* (1863) 32 Beav 421 at 423.

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516. Meaning of words used.

For the purpose of ascertaining the intention, the will is read, in the first place, without reference or regard to the consequences of any rule of law or of construction¹. The words of the will are given that meaning which is rendered necessary in the circumstances of the case by the context of the whole will², the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it³. The will itself is taken as the dictionary from which the meaning of the words is ascertained⁴, however inaccurate that meaning would be in ordinary legal use⁵. Relative terms, such as 'residue'⁶ or 'survivor'⁷, and other terms needing a context to make them intelligible, may be explained only by the context⁸.

1 *Hodgson v Ambrose* (1780) 1 Doug KB 337 at 341; *Earl of Scarborough v Doe d Savile* (1836) 3 Ad & El 897 at 963, Ex Ch; *De Beauvoir v De Beauvoir* (1852) 3 HL Cas 524 at 545 per Lord St Leonards LC; *Macpherson v Stewart* (1858) 28 LJ Ch 177; *Green v Gascoyne* (1865) 4 De GJ & Sm 565 at 569; *Re Parker, Parker v Osborne* [1897] 2 Ch 208 at 213; *Aplin v Stone* [1904] 1 Ch 543; *Comiskey v Bowring-Hanbury* [1905] AC 84 at 89, HL, per Lord Davey; *Edwards v Edwards* [1909] AC 275 at 277, HL, per Lord Macnaghten. The rules of law are applied to the intention thus collected in order to see whether the court is at liberty to carry that intention into effect: *De Beauvoir v De Beauvoir* supra at 545.

2 *Towns v Wentworth* (1858) 11 Moo PCC 526 at 543; *Seale-Hayne v Jodrell* [1891] AC 304 at 306, HL, per Lord Herschell; *Re Pinhorn, Moreton v Hughes* [1894] 2 Ch 276 at 278; *King v Rymill* (1898) 67 LJPC 107.

3 *Higgins v Dawson* [1902] AC 1 at 3-4, HL, per Lord Halsbury LC. See also *Jenkins v Hughes* (1860) 8 HL Cas 571 at 588. A void limitation may be referred to in explanation of the testator's intention: *Martin v Martin* (1866) LR 2 Eq 404 at 411 (but as to the rule of law stated in this case see PARA 737 note 1 post); *Re Wright, Mott v Issott* [1907] 1 Ch 231. It has been suggested, however, that less weight may be given to an indication in an inoperative clause: *Re Watkins, Maybery v Lightfoot* (1913), as reported in 108 LT 237 at 239, CA (revsd sub nom *Lightfoot v Maybery* [1914] AC 782, HL); explained in *Re Johnson, Pitt v Johnson* (1913) 30 TLR 200 (affd (1914) 30 TLR 505, CA).

4 *Hill v Crook* (1873) LR 6 HL 265 at 285 per Lord Cairns (followed in *Re Horner, Eagleton v Horner* (1887) 37 ChD 695 at 703); *Re Jodrell, Jodrell v Seale* (1890) 44 ChD 590 at 606, CA (affd sub nom *Seale-Hayne v Jodrell* [1891] AC 304, HL); *Re Parker, Parker v Osborne* [1897] 2 Ch 208 at 213; *Re Birks, Kenyon v Birks* [1900] 1 Ch 417 at 419, CA; *Re Wood, Wood v Wood* [1902] 2 Ch 542 at 546, CA; *Re Kiddle, Gent v Kiddle* (1905) 92 LT 724 at 725; *Re Lynch, Lynch v Lynch* [1943] 1 All ER 168.

5 Wigram's Extrinsic Evidence (5th Edn) pp 16, 34. The only qualification to this principle is that a clear context is required in order to exclude the ordinary meaning of a word: *Towns v Wentworth* (1858) 11 Moo PCC 526 at 543; *Singleton v Tomlinson* (1878) 3 App Cas 404 at 418; *Higgins v Dawson* [1902] AC 1, HL.

6 *Singleton v Tomlinson* (1878) 3 App Cas 404 at 418; *Higgins v Dawson* [1902] AC 1, HL.

7 *Inderwick v Tatchell* [1903] AC 120 at 123, HL, per Earl of Halsbury LC. See also PARAS 606-610 post.

8 As to evidence in such cases see PARA 481 ante. The expression 'subject thereto' does not necessarily refer only to what has gone before; its effect must be discovered by an examination of the whole scheme of the will: *Re Colville, Colville v Martin* (1911) 105 LT 622.

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517. Legal effect of words.

The fact that, when the testator desires to produce a particular disposition, he shows himself able to choose words clearly apt by law to produce that result may lead to the conclusion that, where he uses other words of doubtful import, he does not wish to produce that result¹. The expression of that which, even if not expressed, would be implied by law has no independent legal effect on the interests created, but, as the whole will is considered, such expressions may be of importance in discovering the testator's intention².

1 *Langston v Langston* (1834) 2 Cl & Fin 194 at 242, HL; *Martin v Welstead* (1848) 18 LJ Ch 1 at 5; *Welland v Townsend* [1910] 1 IR 177, 181 (following *Jury v Jury* (1882) 9 LR Ir 207).

2 See Co Litt 205a; *Lee v Pain* (1844) 4 Hare 201 at 221.

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518. Effect where words are ambiguous in context.

Where a context is found which is sufficient to control the meaning of the words, but the words in that context are ambiguous, contradictory or obscure, or where the words have no special meaning given to them by the context, and have two or more meanings in ordinary use, the court adopts that construction which it considers most likely that, in the circumstances, the testator meant by the words of the will¹, taking into account the general scope of the will and his general purpose². Such considerations are, however permissible only where it is a question of choice between two possible interpretations³; they are not legitimate where the normal meaning of the words offers no difficulty⁴.

The construction is not decided on mere conjecture or belief⁵, but on judicial persuasion⁶ of what is the testator's intention, either expressly declared or collected by just reasoning on the words of the will or evidenced by the surrounding circumstances where they can be called in aid⁷.

In the case of the will of a testator dying on or after 1 January 1983 any part of which is ambiguous on the face of it, extrinsic evidence, including evidence of the testator's intention, is admissible to assist in its interpretation⁸.

1 See *Key v Key* (1853) 4 De GM & G 73 at 84; *Tunaley v Roch* (1857) 3 Drew 720 at 724-725; *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713. Where in a gift there are two sets of technical words, and their technical meanings cannot with consistency be given to both sets, so that 'something has to be sacrificed, it is to be seen what is the least sacrifice to be made, and what will best effectuate the intention of the testator': *Ashton v Adamson* (1841) 1 Dr & War 198 at 208 per Sugden LC.

2 *Blamford v Blamford* (1615) 3 Bulst 98 at 103; *Mellish v Mellish* (1798) 4 Ves 45 at 50; *Coard v Holderness* (1855) 20 Beav 147 at 152, 156; *Prescott v Barker* (1874) 9 Ch App 174 at 187; *Re Whiteley, Bishop of London v Whiteley* [1910] 1 Ch 600. See also *Re Macandrew's Will Trusts, Stephens v Barclays Bank Ltd* [1964] Ch 704, [1963] 2 All ER 919 (where the words 'or widow' being senseless, they were deemed placed in parenthesis and read as indicating a gift over subject to her interest). As to this rule in the construction of executory trusts, where the testator has not been his own conveyancer see *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 at 559, 569, 572; and TRUSTS vol 48 (2007 Reissue) PARA 626.

3 *Giles v Melson* (1873) LR 6 HL 24 at 31 per Lord Selborne LC; *Gibbons v Gibbons* (1881) 6 App Cas 471 at 481, PC; *Re Boden, Boden v Boden* [1907] 1 Ch 132 at 145, CA, per Fletcher Moulton LJ.

4 See eg *Mitchell's Trustees v Aspin* 1971 SLT 166, HL. An exception exists, perhaps, in an extreme case where the language of the will, according to its normal meaning, is of so extravagant and fantastic a nature that the court is forced to conclude that it does not represent the testator's true intention: *Re Boden, Boden v Boden* [1907] 1 Ch 132 at 145, CA, per Fletcher Moulton LJ.

5 *Foley v Burnell* (1783) 1 Bro CC 274 at 284; *Barksdale v Gilliat* (1818) 1 Swan 562 at 565; *Morrall v Sutton* (1845) 1 Ph 533 at 540-541; *Re Elliot, Kelly v Elliot* [1896] 2 Ch 353 at 356; *Inderwick v Tatchell* [1903] AC 120 at 122, HL, per Earl of Halsbury LC; *Walford v Walford* [1912] AC 658 at 664, HL, per Viscount Haldane LC.

6 *A-G v Grote* (1827) 2 Russ & M 699 at 700.

7 *Doe d Brodbelt v Thomson* (1858) 12 Moo PCC 116 at 127 per Turner LJ. See also *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 429-430. As to the evidence admissible see PARAS 481-482 ante.

8 See the Administration of Justice Act 1982 s 21(1)(b), (2); and PARAS 507-508 ante.

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519. Inferences from scope of will.

The court makes any reasonable inference from a particular passage, comparing that inference with what is apparent in other parts of the will¹. This power of inference is, however, limited; a general intention not carried out by some appropriate words in the will itself cannot give the court the right to place the words there for the testator², and a priori reasoning on what the testator would naturally intend cannot be allowed to weigh against the proper construction of the words used³. In particular, the court is not at liberty to conjecture what the testator would have said if a particular state of things had been presented to his mind, which, it is apparent from the language which he has used, had not occurred to him, and for which, therefore, it cannot be supposed that he intended to make any provision⁴.

1 *Law Union and Crown Insurance Co v Hill* [1902] AC 263 at 265, HL, per Earl of Halsbury LC. See also *Jenkins v Hughes* (1860) 8 HL Cas 571 at 588.

2 *Hunter v A-G* [1899] AC 309 at 315, 317, HL, per Earl of Halsbury LC; *Re Evans, Public Trustee v Evans* [1920] 2 Ch 304, CA. As to gifts by implication see PARA 752 post.

3 *Coltsmann v Coltsmann* (1868) LR 3 HL 121 at 130 per Lord Cairns LC.

4 *Martin v Holgate* (1866) LR 1 HL 175 at 186 per Lord Chelmsford. See also *Earl of Scarborough v Doe d Savile* (1836) 3 Ad & El 897 at 962, Ex Ch; *Inderwick v Tatchell* [1903] AC 120, HL.

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520. General and particular intention.

It is said to be a binding rule of construction¹ that, where the court finds on the face of a will a clear, general or paramount intention² to which effect can be given, and a particular or subordinate intention to which, by reason of some rule of law, the court cannot wholly or partially give effect, or which is inconsistent with³, or does not carry out, all the intentions which the testator had or is presumed to have had, then the particular intention must be rejected or modified, and the testator's general intention carried into effect⁴. The rule has, however, been much criticised⁵, and it is doubtful in any event if it really assists in ascertaining the testator's intentions.

1 The rule was said to be an extension, and in its origin merely descriptive, of the operation of the rule in *Shelley's Case* (1581) 1 Co Rep 93b: see *Doe d Gallini v Gallini* (1833) 5 B & Ad 621 at 640 per Denman CJ; *Kavanagh v Morland* (1853) Kay 16 at 25 per Wood V-C. See also *Jenkins v Herries* (1819) 4 Madd 67 (where the doctrine is discussed); and PARA 521 note 3 post. The rule stated in the text is of wider significance; it appears to be a corollary to the general principle that the intention of the testator is to be collected from a consideration of the whole will: see PARA 513 ante. For the rule in *Shelley's Case* (1581) 1 Co Rep 93b, and its abolition, see REAL PROPERTY vol 39(2) (Reissue) PARA 172.

2 This phrase is used to express 'the overriding intention . . . the intention that is to be collected from the whole instrument': *Law Union and Crown Insurance Co v Hill* [1902] AC 263 at 266, HL, per Lord Davey; and see at 265 per Lord Halsbury LC.

3 As to inconsistent gifts see further PARA 523 post.

4 *Robinson v Robinson* (1756) 1 Burr 38 at 50 (affd sub nom *Robinson v Hicks* (1758) 3 Bro Parl Cas 180); *Roe d Dodson v Grew* (1767) 2 Wils 322 at 323-324; *Doe d Blandford v Applin* (1790) 4 Term Rep 82 at 87; *Doe d Candler v Smith* (1798) 7 Term Rep 531 at 533; *Doe d Cock v Cooper* (1801) 1 East 229 at 234; *Doe d Bosnall v Harvey* (1825) 4 B & C 610 at 620; *Fetherston v Fetherston* (1835) 3 Cl & Fin 67 at 75-76, HL; *Monypenny v Dering* (1852) 2 De GM & G 145 at 173; *Towns v Wentworth* (1858) 11 Moo PCC 526 at 543; *Habergham v Ridehalgh* (1870) LR 9 Eq 395 at 400; *Hampton v Holman* (1877) 5 ChD 183 at 190; *Re Sharp, Maddison v Gill* [1908] 2 Ch 190 at 196, CA; *Re Satterthwaite's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Royal Veterinary College* [1966] 1 All ER 919, [1966] 1 WLR 277, CA. See also *Murthwaite v Jenkinson* (1824) 2 B & C 357; *Thellusson v Woodford* (1799) 4 Ves 227 at 329 per Arden MR, citing cases under the cy-près doctrine; *Gilbert's Uses and Trusts* (3rd Edn) p 39n; Co Litt 271b note 1(viii). As to the cy-près doctrine see PARA 521 post.

5 *Jesson v Wright* (1820) 2 Bli 1 at 56-57, HL, per Lord Redesdale; *Doe d Gallini v Gallini* (1833) 5 B & Ad 621 at 640 (where it was said that the doctrine that the general intent must prevail over the particular intent was incorrect and vague, and liable to lead to erroneous results) (affd (1835) 3 Ad & El 340 at 347, Ex Ch); *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 877 (where Lord Wensleydale considered that, notwithstanding the use of the terms 'general intent' and 'particular intent' by Lord Eldon LC in *Jesson v Wright* supra at 51, the doctrine had been abolished by Lord Redesdale's opinion in *Jesson v Wright* supra and by *Doe d Gallini v Gallini* supra at 640, and he thought that the use of the terms should be discontinued). In *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658 at 671, HL, Lord Macnaghten described the doctrine as 'most unsatisfactory'.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/A. ASCERTAINMENT OF INTENTION/521. Cy-près doctrine.

521. Cy-près doctrine.

The important doctrine of cy-près, under which a donor's intention is effectuated as closely as possible, consistently with certain rules of law, is said to be an aspect of the rule as to general and particular intention¹. As regards charitable gifts, the doctrine is well established². Before 1 January 1926 the doctrine was applied to the construction of limitations of real estate so as to create estates tail, in accordance with the general intention, even though the actual limitations failed or were inappropriate³. Technical words of limitation were, however, generally given their normal legal effect, notwithstanding subsequent words which could not take effect, unless these showed very clearly that the testator meant otherwise⁴. Since on and after 1 January 1926 entailed interests could be created only by the like expressions as would have been effectual for the purpose in a deed made before that date⁵, this application of the cy-près doctrine probably became obsolete as regards the wills of testators dying on or after that date⁶, and, since entailed interests cannot be created by instruments coming into operation on or after 1 January 1997⁷, is certainly obsolete as regards the wills of testators dying on or after that date.

1 As to this rule see PARA 520 ante.

2 See the Charities Act 1993 ss 13-15; and CHARITIES vol 8 (2010) PARA 177 et seq. As to the former application of the doctrine of cy-près in relation to gifts to successive generations of unborn issue see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1004.

3 See the cases cited in PARA 520 note 4 ante. See also PARA 675 post; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1004; POWERS vol 36(2) (Reissue) PARA 275. Where there was a devise to several persons in succession in words sufficient to pass to each of them the fee simple or the whole interest of the testator, the court, in order to give effect to the general intention, construed the gift as of successive estates tail: *Studdert v Von Steiglitz* (1889) 23 LR Ir 564 at 573 (following *Ginger d White v White* (1742) Willes 348; *Kershaw v Kershaw* (1854) 3 E & B 845; *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 at 629; *Hennessey v Bray* (1863) 33 Beav 96 at 100; *Watkins v Frederick* (1865) 11 HL Cas 358 at 366; and explaining *Foster v Earl Romney* (1809) 11 East 594; *Purcell v Purcell* (1840) 2 Dr & War 219n; *Bevan v White* (1844) 7 I Eq R 473); *Re Pennefather, Savile v Savile* [1896] 1 IR 249 at 263 (following *Studdert v Von Steiglitz* supra). A name and arms clause was an important element in ascertaining the general intention in such a case: *Studdert v Von Steiglitz* supra at 582.

4 *Jesson v Wright* (1820) 2 Bli 1, HL.

5 See the Law of Property Act 1925 s 130(1) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

6 The cy-près doctrine was not expressly abolished in this respect, and it may possibly still have applied in certain circumstances: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1004; POWERS vol 36(2) (Reissue) PARA 275. As to the construction of executory trusts see TRUSTS vol 48 (2007 Reissue) PARA 669.

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

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522. Rule in *Lassence v Tierney*.

A rule often applicable is the rule, usually referred to as the rule in *Lassence v Tierney*¹, that, where the will contains an absolute gift to a donee in the first instance², and trusts are engrafted or imposed on the absolute interest³ which fail, either for lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary donee or persons entitled on intestacy, as the case may be⁴. The rule

applies both where the original gift is to trustees on trust for the legatee absolutely and where the original gift is to the legatee direct, if the legacy is effectually segregated from the testator's estate⁵. The rule may apply twice in one will and operate on original shares and also on accruing shares⁶.

1 See *Lassence v Tierney* (1849) 1 Mac & G 551. See also *A-G v Lloyds Bank Ltd* [1935] AC 382 at 394, HL, per Lord Tomlin; *Re Gatti's Voluntary Settlement Trusts, De Ville v Gatti* [1936] 2 All ER 1489; *Fyfe v Irwin* [1939] 2 All ER 271, HL. The rule applies to real estate as well as to personalty: *Moryoseph v Moryoseph* [1920] 2 Ch 33.

2 See *McKenna v McCarten* [1915] 1 IR 282; *Re Cohen, Cohen v Cohen* (1915) 60 Sol Jo 239. For examples where the rule could not be applied for want of an absolute gift in the first instance see *Scawin v Watson* (1847) 10 Beav 200; *Lassence v Tierney* (1849) 1 Mac & G 551; *Re Corbett's Trusts* (1860) John 591; *Savage v Tyers* (1872) 7 Ch App 356; *Re Orr, M'Dermott v Anderson* [1915] 1 IR 191; *Re Cohen's Will Trusts, Cullen v Westminster Bank Ltd* [1936] 1 All ER 103; *Re Drought's Will Trusts, Public Trustee v Palmer* (1967) 101 ILTR 1, Eire SC; *Re Goold's Will Trusts, Lloyds Bank Ltd v Goold* [1967] 3 All ER 652; *Watson v Holland (Inspector of Taxes)* [1984] STC 372 (where the decision in *Re Goold's Will Trusts, Lloyds Bank Ltd v Goold* supra was doubted). See also *Re Atkinson's Will Trust, Prescott v Child* [1957] Ch 117, [1956] 3 All ER 738.

3 This must be distinguished from a clause not merely modifying the enjoyment under the absolute gift, but diminishing that estate or totally substituting a new gift: *Gompertz v Gompertz* (1846) 2 Ph 107; *Lassence v Tierney* (1849) 1 Mac & G 551 at 561; *Re Richards, Williams v Gorvin* (1883) 50 LT 22 at 23; *Re Wilcock, Kay v Dewhurst* [1898] 1 Ch 95 at 98-99.

4 *Hancock v Watson* [1902] AC 14 at 22 per Lord Davey. See also *Lassence v Tierney* (1849) 1 Mac & G 551 at 561. For applications of the rule see *Whittell v Dudin* (1820) 2 Jac & W 279; *Hulme v Hulme* (1839) 9 Sim 644; *Mayer v Townsend* (1841) 3 Beav 443; *Campbell v Brownrigg* (1843) 1 Ph 301; *Ridgway v Woodhouse* (1844) 7 Beav 437; *Kellett v Kellett* (1868) LR 3 HL 160; *Bradford v Young* (1885) 29 ChD 617, CA; *FitzGibbon v M'Neill* [1908] 1 IR 1; *Re Currie's Settlement, Re Rooper, Rooper v Williams* [1910] 1 Ch 329 at 334; *Hughes v McNaul* [1923] 1 IR 78, Ir CA; *Re Atkinson, Atkinson v Weightman* [1925] WN 30, CA; *Re Marshall, Graham v Marshall* [1928] Ch 661 (distinguishing *Re Payne, Taylor v Payne* [1927] 2 Ch 1, where the rule was held not to apply); *Re Atkinson's Will Trust, Prescott v Child* [1957] Ch 117, [1956] 3 All ER 738; *Re Leek, Darwen v Leek* [1969] 1 Ch 563, [1968] 1 All ER 793, CA. See also *Re Burton's Settlement Trusts, Public Trustee v Montefiore* [1955] Ch 348, [1955] 1 All ER 433, CA. For cases where the trusts are void for remoteness see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1017, 1089. The rule does not apply to a gift subject to an independent gift over which fails: *Robinson v Wood* (1858) 4 Jur NS 625 (following *Doe d Blomfield v Eyre* (1848) 5 CB 713 at 746, Ex Ch).

5 *Re Connell's Settlement, Re Benett's Trusts, Fair v Connell* [1915] 1 Ch 867; *Re Harrison, Hunter v Bush* [1918] 2 Ch 59.

6 *Re Litt, Parry v Cooper* [1946] Ch 154, [1946] 1 All ER 314, CA.

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523. Inconsistent gifts.

Where in the same will¹ there are two inconsistent gifts, the court first attempts to reconcile the successive provisions without unduly straining the language, and to make the whole consistent with the apparent general intention of the testator². Where the two gifts are irreconcilable and the court can find nothing else to assist in determining the question³ (including, in the case of the will of a testator who died on or after 1 January 1983, direct evidence of his intention⁴), the later clause prevails as being the last expression of the testator's wishes⁵.

The rule that the later gift prevails is used only as a last resort when all attempts to reconcile the various provisions of the will have failed⁶, and is subject to the rule that a prior gift should not be disturbed further than is necessary for the purpose of giving effect to the later

disposition⁷. Accordingly, if there are two absolute gifts, one of all the testator's property or all his property of a certain description, and the other of portions of that property, the more general gift is confined to the residue of that property⁸, and, if there is a clear, unambiguous gift, and a subsequent clause in terms applying to this gift, or to this and other gifts, and, as so applied, inconsistent with the intention taken as a whole, the subsequent clause is neglected, or applied only to other gifts with which it is not inconsistent⁹.

1 Where there is inconsistency between two wills of different dates, revocation may be inferred: see PARA 390 ante. Two wills of the same date, neither of which can be proved to be the last executed, are void for uncertainty, so far as they are irreconcilable: *Phipps v Earl of Anglesey* (1751) 7 Bro Parl Cas 443, HL.

2 *Morrall v Sutton* (1845) 1 Ph 533 at 537; *Glendening v Glendening* (1846) 9 Beav 324 at 326; *Craddock v Craddock* (1858) 4 Jur NS 626 at 627; *Conquest v Conquest* (1868) 16 WR 453; *Re Bedson's Trusts* (1885) 28 ChD 523 at 525, CA; *Taylor v Sturrock*, *Sturrock v Sturrock* [1900] AC 225 at 232-233, PC; *Shields v Shields* [1910] 1 IR 116 at 120.

3 *Doe d Leicester v Biggs* (1809) 2 Taunt 109 at 113 ('for want of a better reason'); *Re Bywater*, *Bywater v Clarke* (1881) 18 ChD 17 at 24, CA, per James LJ.

4 See the Administration of Justice Act 1982 s 21(1)(b), (2); and PARAS 483, 506 ante.

5 *Co Litt* 112b; *Paramour v Yardley* (1579) 2 Plowd 539 at 541; *Fane v Fane* (1681) 1 Vern 30; *Ulrich v Litchfield* (1742) 2 Atk 372; *Sims v Doughty* (1800) 5 Ves 243 at 247; *Constantine v Constantine* (1801) 6 Ves 100 at 102; *Sherratt v Bentley* (1834) 2 My & K 149 at 157; *Morrall v Sutton* (1845) 1 Ph 533 at 536, 545; *Brocklebank v Johnson* (1855) 20 Beav 205 at 212-213; *Re Hammond*, *Hammond v Treharne* [1938] 3 All ER 308 (legacy stated in words to be £100 and then in figures £500; £500 prevailed). See also *Hopkinson v Ellis* (1846) 10 Beav 169 (inconsistent directions as to payment of debts). For the converse rule relating to the construction of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 212.

6 *Re Gare*, *Filmer v Carter* [1952] Ch 80 at 83, [1951] 2 All ER 863 at 865 (where the rule was described as 'a counsel of despair'). See also *Press v Parker* (1825) 10 Moore CP 158 at 167; *White v Parker* (1835) 1 Bing NC 573 at 581; *Marks v Solomons* (1850) 19 LJ Ch 555 (revsg (1849) 18 LJ Ch 234 (where the principle of rejecting the first clause had been relied on)); *Chapman v Gilbert* (1853) 4 De GM & G 366; 3 Bl Com (14th Edn) 380.

7 *Munro v Henderson* [1907] 1 IR 440 at 442 per Barton J; affd [1908] 1 IR 260, Ir CA. See also *Kerr v Baroness Clinton* (1869) LR 8 Eq 462 at 465.

8 *Coke v Bullock* (1604) Cro Jac 49; *Roe d Snape v Nevill* (1848) 11 QB 466. If the more general gift is for life, the other gift may take effect at the end of the life interest: *Young v Burdett* (1724) 5 Bro Parl Cas 54.

9 *Adams v Clerke* (1725) 9 Mod Rep 154 (inconsistent directions as to payment of legacies); *Smith v Pybus* (1804) 9 Ves 566 (to three persons or the survivor of them 'in the order they are now mentioned'); *Doe d Spencer v Pedley* (1836) 1 M & W 662; *Baker v Baker* (1847) 6 Hare 269 ('living' applied only to some of donees); *Bickford v Chalker* (1854) 2 Drew 327 (inconsistent directions as to vesting); *Re Bellamy's Trust* (1862) 1 New Rep 191 ('if living' applied to one only of several).

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524. Double residuary gifts.

Where two gifts of residue are contained in the same will, they are not treated as irreconcilable so as to bring into operation the rule that the later must prevail, for the second gift is construed as intended to operate on lapsed legacies or shares of residue, and as regards other property the first gift is preferred¹. Where, however, one residuary gift is in the will and the other in a codicil, the gift in the will is revoked².

1 *Re Gare, Filmer v Carter* [1952] Ch 80, [1951] 2 All ER 863. See also *Davis v Bennett* (1861) 30 Beav 226; *Kilvington v Parker* (1872) 21 WR 121; *Bristow v Masefield* (1882) 52 LJ Ch 27; *Re Spencer, Hart v Manston* (1886) 54 LT 597; *Johns v Wilson* [1900] 1 IR 342; *Re Isaac, Harrison v Isaac* [1905] 1 Ch 427. It seems that the second residuary gift will include lapsed legacies only where there is a context showing that this was the testator's intention: *Re Jessop* (1859) 11 I Ch R 424, explained in *Re Isaac, Harrison v Isaac* supra; *Davis v Bennett* supra (where lapsed legacies were held to fall into the first gift). As to the rule that the later gift prevails see PARA 523 ante.

2 *Earl Hardwicke v Douglas* (1840) 7 Cl & Fin 795, HL; *Re Stoodley, Hooson v Locock* [1916] 1 Ch 242, CA; *Pennefather v Lloyd* [1917] 1 IR 337. As to revocation by codicil see PARA 392 ante.

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525. Two gifts of the same subject matter.

Where an inconsistency arises through a gift to one person and a subsequent gift in the same instrument of the same thing to another person, it has been held, in order to reconcile the gifts, that both the donees take the gift together as joint tenants or tenants in common¹, or in succession², according to the nature of the gift.

1 Co Litt 112b note (1), by Hargrave; *Paramour v Yardley* (1579) 2 Plowd 539 at 541n; *Anon* (1582) Cro Eliz 9; *Ridout v Pain* (1747) 3 Atk 486 at 493 per Hardwicke LC; but see *Sherratt v Bentley* (1834) 2 My & K 149 at 161-162 per Lord Brougham LC (where the construction by which each donee takes a moiety is criticised). In *Re Alexander's Will Trusts* [1948] 2 All ER 111, where the gift was of a divisible article, each donee took a moiety.

2 See *Anon* (1582) Cro Eliz 9 per Anderson CJ; *Gravenor v Watkins* (1871) LR 6 CP 500, Ex Ch (where the Court of Common Pleas construed the gift as a life estate and remainder in fee, and the Exchequer Chamber, without deciding on the nature of the first interest, held that the second was an estate in fee subject to the first); *Re Bagshaw's Trusts* (1877) 46 LJ Ch 567, CA (where the second gift was to the children of the first taker).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/B. APPLICATION OF RULES OF CONSTRUCTION/526. The rules of construction.

B. APPLICATION OF RULES OF CONSTRUCTION

526. The rules of construction.

Where they are appropriate, the court applies certain established rules of construction from which the testator's intention may be discovered. These rules lay down what inferences ought in doubtful cases to be drawn from particular indications of intention¹; some determine what meaning should in general be given to particular words and expressions which have acquired a technical or quasi-technical nature²; and others determine in what manner particular common forms of disposition are to be given effect, where the testator has not fully and unambiguously disclosed his intentions³.

Well-settled rules of construction are not lightly departed from in cases where they are applicable⁴. If applicable, they are to be observed strictly, but in a reasonable way⁵. They are to be followed only where the testator has not clearly expressed his own intention and has not given any other guide to the court⁶. They are regarded as a dictionary by which all parties, including the court, are bound, but the court does not have recourse to this dictionary to

construe a word or phrase until it has ascertained, from an examination of the language of the whole will, whether or not the testator has indicated his intention of using the word or phrase in other than its dictionary meaning⁷.

1 Eg the rules as to the effect of a gift over on failure of issue, and the rules as to implication of limitations: see PARAS 740, 752 post. For the general approach to construction see PARA 512 ante.

2 *Davenport v Coltman* (1842) 12 Sim 588 at 597; *Grey v Pearson* (1857) 6 HL Cas 61 at 79; *Greville v Browne* (1859) 7 HL Cas 689 at 703; *Re Bawden, National Provincial Bank of England v Cresswell, Bawden v Cresswell* [1894] 1 Ch 693 at 697-698 per Kekewich J ('the dictionary is to be found in those decisions'); *Barraclough v Cooper* [1908] 2 Ch 121n at 124n.

3 *Re Jodrell, Jodrell v Seale* (1890) 44 ChD 590 at 610, CA (previous cases useful 'when they put an interpretation on common forms'). As to the evidence admissible in cases of ambiguity see PARAS 483, 506 ante.

4 *Ralph v Carrick* (1879) 11 ChD 873 at 878, CA, per Cotton LJ; *Re Bedson's Trusts* (1885) 28 ChD 523 at 525-526, CA; *Kirby-Smith v Parnell* [1903] 1 Ch 483 at 490 per Buckley J. See also *Blann v Bell* (1852) 2 De GM & G 775 at 781; *Wake v Varah* (1876) 2 ChD 348 at 357, CA; *A-G v Jefferys* [1908] AC 411 at 413-414, HL, per Earl of Halsbury LC. The ground on which these rules are followed is either that certainty in judicial decisions is thereby attained (*Jesson v Wright* (1820) 2 Bli 1 at 56, HL, per Lord Redesdale; *Doe d Clarke v Ludlam* (1831) 7 Bing 275 at 279; *Morrall v Sutton* (1845) 1 Ph 533 at 536; *Grey v Pearson* (1857) 6 HL Cas 61 at 108; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 884; *Perrin v Morgan* [1943] AC 399 at 420, [1943] 1 All ER 187 at 197, HL, per Lord Romer), or that the rules make it possible to advise confidently on titles (*Roddy v Fitzgerald* supra at 875), or that it is to be assumed that lawyers draw instruments according to the known state of the law, which includes the rules from time to time adopted by the court in the construction of wills, and the testator must be supposed to have used his words in the sense so fixed (*Re Bawden, National Provincial Bank of England v Cresswell, Bawden v Cresswell* [1894] 1 Ch 693 at 697-698; and see *Greville v Browne* (1859) 7 HL Cas 689 at 703; *Kingsbury v Walter* [1901] AC 187 at 189, HL, per Earl of Halsbury). It has been suggested that they were invented to give effect to what is in average instances the intention of the testator: *Re Inman, Inman v Rolls* [1893] 3 Ch 518 at 520 per Kekewich J.

5 *Perrin v Morgan* [1943] AC 399 at 420, [1943] 1 All ER 187 at 197, HL, per Lord Romer.

6 *Limpus v Arnold* (1884) 15 QBD 300 at 302, CA; *Re Coward, Coward v Larkman* (1887) 57 LT 285 at 287, CA; *Re Hamlet, Stephen v Cunningham* (1888) 39 ChD 426 at 434, CA; *Re Stone, Baker v Stone* [1895] 2 Ch 196 at 200, CA.

7 *Perrin v Morgan* [1943] AC 399 at 421, [1943] 1 All ER 187 at 197, HL, per Lord Romer. The rules of construction, therefore, merely denote an inference in favour of a given construction of particular words (*Lee v Pain* (1844) 4 Hare 201 at 216-217 per Wigram V-C), and are subject to any contrary intention disclosed by the will (*Singleton v Tomlinson* (1878) 3 App Cas 404 at 423, HL, per Lord Hatherley). In this respect they differ from rules of law, which operate independently of, and even contrary to, the testator's intention. Formerly, a number of technical rules of law were applicable in the case of real estate, whatever was the intention of the testator, but such rules are now obsolete: see eg REAL PROPERTY vol 39(2) (Reissue) PARA 174. In the case of personal estate there are no technical rules to prevent effect being given to the intention of the testator (*Audsley v Horn* (1859) 1 De GF & J 226 at 237 per Lord Campbell LC), where not otherwise contrary to law; and this is probably now true of real estate also. Cf *Re Heath, Public Trustee v Heath* [1936] Ch 259 at 265; and PARA 707 note 8 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/B. APPLICATION OF RULES OF CONSTRUCTION/527. Words used in their ordinary sense.

527. Words used in their ordinary sense.

If the language of the will can be read in its ordinary and natural sense¹ so as to make sense with respect to the surrounding circumstances, no rule of construction is applicable to ascertain the testator's intention², and no reliance may be placed on former decisions of the court on similar or even identical words in other wills³.

Previous decisions on the meaning of a word or phrase⁴ may assist the court to determine what its true meaning may be, but they do not prevent the court from attributing a different meaning to that word or phrase in a different will, at a different date, and in a different context⁵.

1 See PARA 532 post; and see generally para 512 ante.

2 *Leader v Duffey* (1888) 13 App Cas 294 at 301, 303, HL, per Earl of Halsbury; *Inderwick v Tatchell* [1903] AC 120 at 122, HL, per Earl of Halsbury; *Comiskey v Bowring-Hanbury* [1905] AC 84 at 88, HL, per Earl of Halsbury.

3 *Gorringe v Mahlstedt* [1907] AC 225 at 226, HL, per Earl of Halsbury. See also *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640 at 653, CA; *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 228, 232, CA; *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369 at 373, CA; *Macculloch v Anderson* [1904] AC 55 at 60, HL, per Earl of Halsbury; *Chapman v Perkins* [1905] AC 106 at 108, HL, per Earl of Halsbury; *Re Cope, Cross v Cross* [1908] 2 Ch 1 at 3, CA.

4 For words and expressions which have been judicially defined see PARA 537 post.

5 See *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176 at 189, CA. See also *Re Athill, Athill v Athill* (1880) 16 ChD 211 at 223, CA, per Jessel MR; *Perrin v Morgan* [1943] AC 399 at 417, [1943] 1 All ER 187 at 195, HL, per Lord Thankerton.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/B. APPLICATION OF RULES OF CONSTRUCTION/528. Weight to be given to previous decisions.

528. Weight to be given to previous decisions.

Previous cases on the construction of other wills are considered by the court, particularly where the question relates to real property¹, but no weight is given to them² except in so far as they lay down some rule of construction³ applicable to the case before the court or are based on reasoning which commends itself to the court. The proper way to construe a will is to form an opinion apart from the cases and then to see whether the cases require a modification of that opinion, not to begin by considering how far the will resembles other wills on which decisions have been given⁴.

Although the court may follow a previous decision on another will where the language was identical with, or very similar to, that in the will under consideration⁵, and where no real distinction exists between the cases⁶, mere similarity of language does not bind the court to adopt a similar construction⁷. The surrounding circumstances may be different in every case and may give a different meaning to the words⁸, and it is the principles of construction exemplified, rather than the particular decisions themselves, which are followed⁹. One judge is not bound to follow another on questions of mere verbal interpretation¹⁰, and, even when the established rules of construction are properly applied, two minds may fairly differ¹¹.

1 *Miles v Harford* (1879) 12 ChD 691 at 698; *Morgan v Thomas* (1882) 9 QBD 643 at 644, CA; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314 at 318. The fact that the testator's intention as to a blended gift of real and personal estate was defeated by these rules so far as regards the real estate did not prevent effect being given to his intention as to the personal estate: *Holmes v Prescott* (1864) 10 Jur NS 507.

2 *Roe d Dodson v Grew* (1767) 2 Wils 322 at 324; *Re Masson, Morton v Masson* (1917) 86 LJ Ch 753 at 756, CA. See also the cases cited in PARA 527 note 3 ante.

3 *Doe d Smith v Fleming* (1835) 2 Cr M & R 638 at 651 per Lord Abinger CB; *Re Ingle's Trusts* (1871) LR 11 Eq 578 at 586-587; *Waring v Currey* (1873) 22 WR 150; *Singleton v Tomlinson* (1878) 3 App Cas 404 at 415, 423; *Re Jackson's Will* (1879) 13 ChD 189 at 194; *Re Jodrell, Jodrell v Seale* (1890) 44 ChD 590 at 610, CA; *Re*

Morgan, Morgan v Morgan [1893] 3 Ch 222 at 232, CA; *Walford v Walford* [1912] AC 658 at 664, HL, per Viscount Haldane LC.

4 *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640 at 659-660, CA, per Kay LJ; *Re Blanter, Lowe v Cooke* [1891] WN 54, CA (adopted in *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939 at 941 per Joyce J); *Re Williams, Metcalf v Williams* [1914] 1 Ch 219 at 222 (affd [1914] 2 Ch 61, CA); *Stewart v Murdoch* [1969] NI 78 at 89 per Lord MacDermott LC]. This whole paragraph as set out in a previous edition of this work was cited and approved in *Re Ramadge* [1969] NI 71 at 74 per Lowry J. As to the authority in general of judicial decisions see CIVIL PROCEDURE vol 11 (2009) PARA 91 et seq.

5 Previous cases may be of little use, for the words of one will are seldom the same as those of another: *Rhodes v Rhodes* (1882) 7 App Cas 192 at 206, PC.

6 *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 875; *Thorpe v Thorpe* (1862) 1 H & C 326 at 336-337; *Lightfoot v Burstall* (1863) 1 Hem & M 546 at 549. See also *Doe d Penwarden v Gilbert* (1821) 6 Moore CP 268 at 281 ('literally and substantially the same').

7 *Cormack v Copous* (1853) 17 Beav 397 at 402; *Hood v Clapham* (1854) 19 Beav 90 at 94; *Slingsby v Grainger* (1859) 7 HL Cas 273 at 284. 'The nonsense of one man cannot be a guide for that of another': *Smith v Coffin* (1795) 2 Hy Bl 444 at 450. See also *Re Nolan, Sheridan v Nolan* [1912] 1 IR 416 at 420. As to the testator's intention being gathered from the words of the will see *Graves v Bainbrigge* (1792) 1 Ves 562 at 564 per Lord Commissioner Eyre (cf para 534 text and note 9 post); and see PARA 476 ante.

8 See *Grey v Pearson* (1857) 6 HL Cas 61 at 108 per Lord Wensleydale; *Abbott v Middleton* (1858) 7 HL Cas 68 at 119 per Lord Wensleydale (cited with approval in *Walford v Walford* [1912] AC 658 at 664, HL, per Viscount Haldane LC). See also *Doe d Long v Laming* (1760) 2 Burr 1100 at 1112; *Sayer v Bradley* (1856) 5 HL Cas 873 at 894; *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 764; *Re Coley, Hollinshead v Coley* [1903] 2 Ch 102 at 109, CA; *Perrin v Morgan* [1943] AC 399 at 408, [1943] 1 All ER 187 at 191, HL. Compare eg *Lord Douglas v Chalmer* (1795) 2 Ves 501 with *Hinckley v Simmons* (1798) 4 Ves 160 (both cases commented on by Lord Eldon LC in *Cambridge v Rous* (1802) 8 Ves 12 at 22).

9 See *Waite v Littlewood* (1872) 8 Ch App 70 at 73 per Lord Selborne LC; *Re Booth, Booth v Booth* [1894] 2 Ch 282 at 285.

10 *Re Veale's Trusts* (1876) 4 ChD 61 at 68 per Jessel MR, who described this rule as the rule laid down by the House of Lords in *Jenkins v Hughes* (1860) 8 HL Cas 571. On a question of mere construction, even the decision of the appeal court on similar grounds is not binding on another court, and much less on a court of equal jurisdiction: *Hack v London Provident Building Society* (1883) 23 ChD 103 at 111, CA, per Jessel MR.

11 *Vickers v Pound* (1858) 6 HL Cas 885 at 899 per Lord Wensleydale; *Re Veale's Trusts* (1876) 4 ChD 61 at 65 per Jessel MR (affd (1877) 5 ChD 622, CA); *Selby v Whittaker* (1877) 6 ChD 239 at 245, CA. See further *Re Chapman, Perkins v Chapman* [1904] 1 Ch 431, CA (where the members of the court agreed as to the principles to be applied, but differed as to the result). See also *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876; *Rhodes v Rhodes* (1882) 7 App Cas 192 at 204, PC.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/B. APPLICATION OF RULES OF CONSTRUCTION/529. Citation of Scottish cases.

529. Citation of Scottish cases.

Scottish cases are available as authorities for the general principles of construction of wills, as those principles are the same in both countries¹. There are also similar rules of construction in particular cases which exist in both systems of jurisprudence², but the law of Scotland does not comprise every rule of construction applicable in England³.

1 *Young v Robertson* (1862) 4 Macq 314, HL; *Hickling v Fair* [1899] AC 15 at 26, HL, per Lord Shand.

2 See *Taylor v Graham* (1878) 3 App Cas 1287 at 1293, HL, per Lord Gordon.

3 *Hickling v Fair* [1899] AC 15 at 25, HL, per Lord Herschell. In the construction of English wills, the rules of another system of jurisprudence may be of authority. Thus in many cases, in the construction of wills of personal estate, the court follows the maxims of the civil law, which were sometimes introduced by ecclesiastical courts having jurisdiction in probate matters, including the greater part of the rules as to legacies: *Monkhouse v Holme* (1783) 1 Bro CC 298 at 300; *Hanson v Graham* (1801) 6 Ves 239; Tudor, LC Real Prop (4th Edn) 440; *Leeming v Sherratt* (1842) 2 Hare 14 at 17; *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 299; *Key v Key* (1853) 4 De GM & G 73 at 85.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(i) In general/B. APPLICATION OF RULES OF CONSTRUCTION/530. Construction of wills containing a foreign element.

530. Construction of wills containing a foreign element.

The general principles of construction appear to apply to all wills, whether English or foreign, as being common to every system of jurisprudence¹. However, for the purpose of ascertaining the testator's intention, different systems of law may apply different rules of construction, and effect will be given to any direction in the will, whether express or implied, that it is to be construed in accordance with the rules of construction of any particular system². The use of technical expressions peculiar to a particular system of law³ and the testator's choice of language⁴ are treated as indications, but not conclusive indications⁵, of the system to be applied⁶.

Where the will is to be construed according to English rules but is written in a foreign language, the court looks at the effect of that language only in order to ascertain what are the equivalent expressions in English⁷.

1 Eg the rule that every will is to be construed in accordance with the intention of the testator as discovered by the will: see PARA 513 ante.

2 *Duchess di Sora v Phillips* (1863) 10 HL Cas 624 at 633 per Lord Cranworth (a case of contract, but the principle applies to the construction of wills). Cf *Re Harman, Lloyd v Tardy* [1894] 3 Ch 607 at 611, 613; *Raphael v Boehm, Cockburn v Raphael* (1852) 22 LJ Ch 299; *Re Price, Tomlin v Latter* [1900] 1 Ch 442; *Re Allen's Estate, Prescott v Allen and Beaumont* [1945] 2 All ER 264. See also *Re Sandys' Will Trust, Sandys v Kirton* [1947] 2 All ER 302, CA; and CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 453-455.

3 *Studd v Cook* (1883) 8 App Cas 577, HL; *Re Cliff's Trusts* [1892] 2 Ch 229.

4 See *Studd v Cook* (1883) 8 App Cas 577 at 593, HL, per Earl of Selbourne LC, and at 600-601 per Lord Watson; *Re Baker's Settlement Trusts, Hunt v Baker* [1908] WN 161; *Re Bonnefoi, Surrey v Perrin* [1912] P 233 at 238-239, CA.

5 *Bradford v Young* (1885) 29 ChD 617 at 624, CA.

6 Where the testator's intention is not expressed and cannot be inferred, the court acts on certain presumptions: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 453.

7 *Reynolds v Kortright* (1854) 18 Beav 417 at 426 per Romilly MR. Cf *Baring v Ashburton* (1886) 54 LT 463. As to the evidence admissible in the case of a will in a foreign language see PARA 491 ante.

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531. Rules of law to be considered.

For the purpose of ascertaining the testator's intention, those rules which prevailed when the will was made, and with reference to which the will may be fairly presumed to have been framed, must be observed¹, except where the testator by his will expressly or by implication refers to the law as existing at his death².

An Act of Parliament passed subsequent to the date of a will does not usually affect the ascertainment of the testator's intentions³, although it may affect their legal operation⁴.

1 *Re March, Mander v Harris* (1884) 27 ChD 166 at 169, CA.

2 See *Re Bridger, Brompton Hospital for Consumption v Lewis* [1894] 1 Ch 297, CA (gift of property by reference to law of mortmain construed as meaning law at the time of death); *Re Turnbull, Skipper v Wade* [1905] 1 Ch 726 ('free from duty' included duties imposed after the will).

3 *Jones v Ogle* (1872) 8 Ch App 192 at 195 per Lord Selborne LC; *Miller v Callender* (1993) Times, 4 February, HL (succession regulated by the law as it stood at time of testator's death, not by law as it stood at time of vesting). Cf the Administration of Justice Act 1982 ss 20-21 (rectification and interpretation of wills), which apply to the will of a testator who died on or after 1 January 1983 regardless of when the will was made: see PARAS 408, 483 ante.

4 *Re Rayer, Rayer v Rayer* [1903] 1 Ch 685 at 688 (citing *Re Bridger, Brompton Hospital for Consumption v Lewis* [1894] 1 Ch 297, CA). See also *Hasluck v Pedley* (1874) LR 19 Eq 271 at 274 (explained in *Re March, Mander v Harris* (1884) 27 ChD 166 at 169, CA; and followed in *Constable v Constable* (1879) 11 ChD 681 at 686); *Re Baroness Llanover, Herbert v Freshfield (No 2)* [1903] 2 Ch 330; *Re Yates* [1919] P 93.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/532. Words prima facie to receive their grammatical and ordinary meaning.

(ii) Context, Meaning and Effect of Words

532. Words prima facie to receive their grammatical and ordinary meaning.

It is a general rule¹, applicable to all wills², that, unless it appears from the context of the whole will that the testator intended a different meaning to be given to the words³, ordinary words are to be first read in their grammatical and ordinary sense⁴, and legal and technical words in their legal and technical sense⁵, and the usual rules of grammar are to be applied⁶.

1 *Re Crawford's Trusts* (1854) 2 Drew 230 at 233 per Kindersley V-C; *Gether v Capper* (1855) 24 LJCP 69 at 71; *Southgate v Clinch* (1858) 4 Jur NS 428 at 429. The rule comes from Justinian's Digest: see Just Dig lib 32 s 69, cited in *Hart v Tulk* (1852) 2 De GM & G 300 at 313 and in *Lowe v Thomas* (1854) 5 De GM & G 315 at 316. The rule that words are to be read in their ordinary and grammatical sense has been enunciated in a very large number of cases, and is commonly described as the 'golden' rule; it is applicable to all kinds of instruments: see *Re Levy, ex p Walton* (1881) 17 ChD 746 at 751, CA; *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114 at 131, HL, per Lord Blackburn; *Spencer v Metropolitan Board of Works* (1882) 22 ChD 142 at 148, CA; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 169.

2 *Smith v Butcher* (1878) 10 ChD 113 at 116 per Jessel MR.

3 *Hamilton v Ritchie* [1894] AC 310 at 313, HL, per Lord Watson. See also *Gordon v Gordon* (1871) LR 5 HL 254 at 271 per Lord Chelmsford. The rule as to giving the ordinary meaning to a word is thus not a hard and fast rule, since it is entirely subservient to the context of the will: see *Seale-Hayne v Jodrell* [1891] AC 304 at 306, HL, per Lord Herschell; *Perrin v Morgan* [1943] AC 399 at 421, [1943] 1 All ER 187 at 197-198, HL, per Lord Romer; and PARA 533 post.

4 *Thellusson v Woodford, Woodford v Thellusson* (1799) 4 Ves 227 at 329 per Arden MR; adopted in *Villar v Sir Walter Gilbey* [1907] AC 139 at 147 per Lord Atkinson. See also *Poole v Poole* (1804) 3 Bos & P 620 at 627; *Church v Mundy* (1808) 15 Ves 396 at 406; *Trevor v Trevor* (1847) 1 HL Cas 239 at 264, 266-267, 270; *Williams*

v Lewis (1859) 6 HL Cas 1013 at 1023; *De Windt v De Windt* (1866) LR 1 HL 87 at 92; *Gibbons v Gibbons* (1881) 6 App Cas 471 at 479, PC; *Hamilton v Ritchies* [1894] AC 310 at 313, HL, per Lord Watson; *Higgins v Dawson* [1902] AC 1 at 12, HL, per Lord Davey; *Gorringe v Mahlstedt* [1907] AC 225 at 227, HL, per Earl of Halsbury; *Tarbutt v Nicholson* (1920) 89 LJPC 127; *Perrin v Morgan* [1943] AC 399 at 406, [1943] 1 All ER 187 at 190, HL, per Viscount Simon LC; *D'Abo v Paget* [2000] All ER (D) 944.

5 *Aumble v Jones* (1709) 1 Salk 238; *Buck d Whalley v Nurton* (1797) 1 Bos & P 53 at 57; *Jesson v Wright* (1820) 2 Bli 1 at 57, HL; *Roddy v Fitzgerald* (1858) 6 HL Cas 823; *Giles v Melsom* (1873) LR 6 HL 24 at 31; *Von Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 672, 684, HL, per Lord Macnaghten; *Re Keane's Estate* [1903] 1 IR 215; *Re Simcoe*, *Vowler-Simcoe v Vowler* [1913] 1 Ch 552 at 557; *Davy v Redington* [1917] 1 IR 250, Ir CA.

6 *Re Harrison*, *Turner v Hellard* (1885) 30 ChD 390 at 393, CA. Thus relative pronouns and other relative expressions are prima facie referable to the last antecedent: *Castledon v Turner* (1745) 3 Atk 257; *Adshead v Willetts* (1861) 29 Beav 358 at 361; *Re Williams*, *Gregory v Muirhead* (1913) 134 LT Jo 619. For an example to the contrary see *Fox v Collins* (1761) 2 Eden 107. The construction of a will may thus be a question for a grammarian rather than for a lawyer: *Fenny d Collings v Ewestace* (1815) 4 M & S 58 at 60; *Child v Elsworth* (1852) 2 De GM & G 679 at 683.

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533. Effect of context and circumstances in excluding rule.

Where words interpreted in their ordinary and grammatical sense are consistent with the surrounding circumstances¹, this sense of the words must be adhered to². Where, however, that course would lead to some absurdity³ or some repugnance or inconsistency with the declared intention of the testator, collected from the whole of the will, the grammatical and ordinary, or the technical, sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further⁴. If the testator's intention can be collected with reasonable certainty from the whole will, with the aid of extrinsic evidence of a kind properly admissible⁵, that intention must have effect given to it beyond and even against the literal or ordinary sense of particular words and expressions, and the court is not bound to adhere to the ordinary or legal meaning⁶.

In order to deprive words of their appropriate usual sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that other sense is⁷. The burden of proof lies on those who attribute to the words such other sense⁸.

1 *Shore v Wilson*, *Lady Hewley's Charities* (1842) 9 Cl & Fin 355 at 525, HL. As to the admissibility of evidence of surrounding circumstances see PARA 500 et seq ante.

2 Wigram's Extrinsic Evidence (5th Edn) p 18, Proposition II; adopted in *Croker v Marquess of Hertford* (1844) 4 Moo PCC 339 at 364. See also *Re Cope*, *Cross v Cross* [1908] 2 Ch 1 at 4, CA; *Livesey v Livesey* (1849) 2 HL Cas 419 at 432.

3 An 'absurdity' does not mean merely a result which the court considers ought not to have been the testator's intention: *Rhodes v Rhodes* (1882) 7 App Cas 192 at 205, PC.

4 *Warburton v Loveland d Ivie* (1828) 1 Hud & B 623 at 648, Ex Ch, per Burton J (affd (1832) 2 Dow & Cl 480, HL); adopted in *Grey v Pearson* (1857) 6 HL Cas 61 at 106 per Lord Wensleydale. See also *Hicks v Sallitt* (1854) 3 De GM & G 782 at 793-794; *Grey v Pearson* supra at 78 per Lord Cranworth LC; *Abbott v Middleton*, *Ricketts v Carpenter* (1858) 7 HL Cas 68 at 94, 114; *Slingsby v Grainger* (1859) 7 HL Cas 273 at 284; *Thellusson v Lord Rendlesham*, *Thellusson v Thellusson*, *Hare v Robarts* (1859) 7 HL Cas 429 at 454, 470, 488, 490, 494, 519; *Long v Lane* (1885) 17 LR Ir 11 at 35, Ir CA; *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 117, HL, per Lord Macnaghten; *Re Ionides*, *London County Westminster and Parr's Bank Ltd v Craies* [1922] WN 46. It has been said that the rule that words are to receive their ordinary and grammatical meaning speaks,

not of the meaning of a word, but of a sentence, or of a series of limitations in a will: *Cave v Horsell* [1912] 3 KB 533 at 544, CA, per Buckley LJ. It has also been observed that the branch of the rule stated in the text seems to be but a means of showing by the context that the words were not used in their ordinary sense: *Thellusson v Lord Rendlesham*, *Thellusson v Thellusson*, *Hare v Robarts* supra at 494 per Lord Cranworth; *Rhodes v Rhodes* (1882) 7 App Cas 192 at 205, PC.

5 As to the admissibility of extrinsic evidence see PARA 481 et seq ante.

6 *Vauchamp v Bell* (1822) 6 Madd 343 at 347; *Key v Key* (1853) 4 De GM & G 73 at 84; *Ware v Watson* (1855) 7 De GM & G 248 at 259; *Grey v Pearson* (1857) 6 HL Cas 61 at 99 per Lord St Leonards; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 871 per Lord Cranworth LC; *Pride v Fooks* (1858) 3 De G & J 252 at 266; *Redfern, Redfern v Bryning* (1877) 6 ChD 133 at 136. See also 2 BI Com (14th Edn) 379.

7 *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 877 per Lord Wensleydale; *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 672, HL, per Lord Macnaghten.

8 *Re Crawford's Trusts* (1854) 2 Drew 230 at 233 per Kindersley V-C.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/534. Testator's right to be capricious.

534. Testator's right to be capricious.

A testator has a right to be capricious if he chooses¹, and, subject to the statutory jurisdiction to award reasonable financial provision in favour of the testator's spouse, former spouse, cohabitee, child or dependant², his bounty is absolute and without control as to motive³. Accordingly, if the words used by the testator are unambiguous in the context, the sense given to the words by the context cannot be departed from, nor is the court induced to put a meaning on them different from that which it judicially determines to be their meaning, on account of any difficulty or inconvenience in carrying out the intention⁴, or because they lead to consequences which are generally considered capricious⁵, unusual⁶, unjust⁷, harsh, unreasonable⁸ or even absurd⁹.

1 *Hart v Tulk* (1852) 2 De GM & G 300 at 313; *Boosey v Gardener* (1854) 5 De GM & G 122 at 124; *Varley v Winn* (1856) 2 K & J 700 at 707; *Jenkins v Hughes* (1860) 8 HL Cas 571 at 589, 592; *Re Hamlet, Stephen v Cunningham* (1888) 39 ChD 426 at 434, CA; *Crawford's Trustees v Fleck* 1910 SC 998 at 1009.

2 Ie under the Inheritance (Provision for Family and Dependents) Act 1975: see PARA 322 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 665 et seq. The category of cohabitee, ie someone who, during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased, was introduced in relation to persons dying on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 2, amending the Inheritance (Provision for Family and Dependents) Act 1975 s 1.

3 *Occleston v Fullalove* (1874) 9 Ch App 147 at 161.

4 *Driver d Frank v Frank* (1814) 3 M & S 25 at 30-31 per Dampier J (citing authorities to show that, even if the court is perfectly aware of the testator's intention, effect cannot be given to it unless it appears from the words of the will); affd on appeal (1818) 8 Taunt 468. See also *Gaskell v Harman* (1801) 6 Ves 159 (on appeal (1805) 11 Ves 489 at 497); *Elwin v Elwin* (1803) 8 Ves 547 at 554-555; *Defflis v Goldschmidt* (1816) 1 Mer 417 at 419-420; *Bernard v Mountague* (1816) 1 Mer 422 at 431; *Smith v Streatfield* (1816) 1 Mer 358 at 360; *Martineau v Briggs* (1875) 45 LJ Ch 674, HL; *Re Seal*, *Seal v Taylor* [1894] 1 Ch 316 at 321, CA.

5 *Wharton v Barker* (1858) 4 K & J 483 at 503; *Abbott v Middleton*, *Ricketts v Carpenter* (1858) 7 HL Cas 68 at 89 per Lord Cranworth (adopted in *Bathurst v Errington* (1877) 2 App Cas 698 at 709, HL, per Lord Cairns LC); *Selby v Whittaker* (1877) 6 ChD 239 at 245, CA; *Hickling v Fair* [1899] AC 15 at 33, HL, per Lord Shane, and at 38 per Lord Davey; *Re Whitmore*, *Walters v Harrison* [1902] 2 Ch 66 at 70, CA.

6 *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 678, HL, per Lord Macnaghten.

7 *Inderwick v Tatchell* [1903] AC 120 at 123, HL, per Earl of Halsbury, and at 126 per Lord Lindley.

8 *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 89 per Lord Cranworth; *Bathurst v Errington* (1877) 2 App Cas 698. See also *Mason v Robinson* (1825) 2 Sim & St 295 at 299 (irrational dispositions); *Re Pollard's Estate* (1863) 3 De GJ & Sm 541 at 553 (dispositions in part unusual, in part eccentric); *Martin v Holgate* (1866) LR 1 HL 175 at 189.

9 *Graves v Bainbrigge* (1792) 1 Ves 562 at 564; but see *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676 (where unambiguous words producing an absurd result were construed so as to produce a rational result).

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535. Presumption in ambiguous cases.

Without some clear expression of intention on a testator's part the court does not attribute to him a capricious intention¹, or a whimsical or harsh result to his dispositions², where the words of his will can be read otherwise. Accordingly, if, in the absence of direct evidence of intention³, the language used in a will admits of two constructions, according to one of which the property disposed of devolves in a rational, convenient and ordinary course of succession, and according to another in an irrational and inconvenient course, so that the court would be driven to the conclusion that the testator was acting capriciously, without any intelligible motive and contrary to the ordinary mode in which persons act in similar cases, the court leans towards the former construction as being that which was intended, even if this requires a meaning to be given to the words different from their ordinary meaning⁴.

1 *Hillersdon v Lowe* (1843) 2 Hare 355 at 366; *Hart v Tulk* (1852) 2 De GM & G 300 at 313; *Thellusson v Lord Rendlesham, Thellusson v Thellusson, Hare v Robarts* (1859) 7 HL Cas 429 at 497-498.

2 *Barraclough v Cooper* [1908] 2 Ch 121n at 125n. See also *Vickers v Pound* (1858) 6 HL Cas 885 at 897; *Bathurst v Errington* (1877) 2 App Cas 698 at 714, HL, per Lord Hatherley.

3 Ie where there is an ambiguity on the face of the will of a testator who died on or after 1 January 1983: see the Administration of Justice Act 1982 s 21(1)(b), (2); and PARAS 483, 507-508 ante

4 *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 89 per Lord Cranworth. See also *Jenkins v Herries* (1819) 4 Madd 67 at 82 per Leach V-C; *Jenkins v Hughes* (1860) 8 HL Cas 571 at 592; *Atkinson v Holtby* (1863) 10 HL Cas 313 at 330; *Sidney v Wilmer* (1863) 4 De GJ & Sm 84 at 103; *Gordon v Gordon* (1871) LR 5 HL 254 at 279, 284; *Bathurst v Errington* (1877) 2 App Cas 698 at 709, 711, HL, per Lord Cairns; *Selby v Whittaker* (1877) 6 ChD 239 at 248, CA; *Re Hudson, Hudson v Hudson* (1882) 20 ChD 406 at 417; *Locke v Dunlop* (1888) 39 ChD 387 at 393, CA; *Bowman v Bowman* [1899] AC 518 at 528, HL, per Lord Watson; *Re Whitmore, Walters v Harrison* [1902] 2 Ch 66 at 70, CA; *Re Jones, Lewis v Lewis* [1910] 1 Ch 167 at 172-173.

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536. Words having more than one primary meaning.

There are few words, if indeed there are any, which bear a meaning so exact that the reader can disregard the surrounding circumstances and the context in ascertaining the sense in which they are employed¹. Where a word has more than one proper and recognised meaning,

the question in which sense it is used in a particular passage must be decided by the context and the surrounding circumstances, and no one meaning can be treated as having a paramount claim to be adopted in preference to any other².

1 *Seale-Hayne v Jodrell* [1891] AC 304 at 306, HL, per Lord Herschell; *Cave v Horsell* [1912] 3 KB 533 at 543, CA, per Buckley LJ. See also *Hodgson v Ambrose* (1780) 1 Doug KB 337 at 341; *Doe d Andrew v Lainchbury* (1809) 11 East 290 at 296. Cf *Re Osburn* (1969) 113 Sol Jo 387, CA (where a gift of a house was held not to be included in a 'list of small presents').

2 *Cave v Horsell* [1912] 3 KB 533 at 543, CA; *Perrin v Morgan* [1943] AC 399 at 406, 417, [1943] 1 All ER 187 at 190, 195. A word which is not in its ordinary meaning a technical word may have several senses and be used in one of them in which it is technical: *Clayton v Gregson* (1835) 5 Ad & El 302 at 308.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/537. Words judicially defined.

537. Words judicially defined.

Among the words and expressions which have been in common use in wills, the meaning of which at large, or as affected by various contexts, has been the subject of judicial determination, are the following¹: 'business'²; 'creditors'³; 'entitled'⁴; 'except upon' attaining an age⁵; 'executorship expenses' or 'testamentary expenses'⁶; 'free of duty'⁷; 'gifts or settlements'⁸; 'probate valuation'⁹; 'marriage'¹⁰; 'unmarried'¹¹; 'minority'¹²; 'during the present war'¹³; and 'simultaneous death'¹⁴. The words 'subject to the provisions of the preceding clause' mean subject to any effective disposition under that clause¹⁵.

1 For other examples in relation to property and donees see PARAS 577 et seq, 619 et seq post.

2 'Business' in a clause containing a power of advancement has been held to include a medical practice: *Re Williams' Will Trusts, Chartered Bank of India, Australia and China v Williams* [1953] Ch 138, [1953] 1 All ER 536. For the meaning of 'business' see also PARA 578 post.

3 'Creditors' extends to all creditors, secured as well as unsecured: *Re Leach, Chatterton v Leach* [1948] Ch 232, [1948] 1 All ER 383.

4 'Entitled' may mean entitled in possession, or entitled in interest: *Chorley v Loveband* (1863) 33 Beav 189; *Re Grylls' Trusts* (1868) LR 6 Eq 589; *Umbers v Jaggard* (1870) LR 9 Eq 200; *Abbiss v Burney, Re Finch* (1880) 17 ChD 211 at 223; *Re Fothergill's Estate, Price-Fothergill v Price* [1903] 1 Ch 149. For the meaning of 'entitled as aforesaid' see *Re Whiter, Windsor v Jones* (1911) 105 LT 749.

5 This means 'not before': *Re Sumner's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Sumner* [1969] 1 All ER 779, [1969] 1 WLR 373.

6 These terms are ordinarily synonymous, and denote the expenses incident to the proper performance of the executor's duty: *Sharp v Lush* (1879) 10 ChD 468 at 470; *Re Matthews's Will Trusts, Bristow v Matthews* [1961] 3 All ER 869, [1961] 1 WLR 1415. For the meaning of 'expenses' see *Re Berrey's Will Trusts, Greening v Waters* [1959] 1 All ER 15, [1959] 1 WLR 30. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 433, 436. 'Expenses' includes inheritance tax (formerly known as capital transfer tax) attributable to the value of all property (real and personal) in the United Kingdom vesting in the deceased's personal representatives; such tax is prima facie treated as a testamentary expense, but not foreign tax or inheritance tax payable in respect of foreign property or settled property, which is not: see the Inheritance Tax Act 1984 s 211(1), (2); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 435.

7 'Free of duty' prima facie refers to duty payable under English law and not to duty payable under foreign law, and to duty payable on the testator's death and not to future duty: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 548. References to estate duty in any instrument whenever executed have effect as if they included references to inheritance tax (formerly known as capital transfer tax): *ibid* s 273, Sch 6 para 1; and see INHERITANCE TAXATION vol 24 (Reissue) PARA 401.

8 See *Re Noad, Midland Bank Executor and Trustee Co Ltd v Noad* [1944] 2 All ER 470, CA (where, in the context, the words meant any benefaction); *Re Figgis, Roberts v MacLaren* [1969] 1 Ch 123, [1968] 1 All ER 999 (where 'gifts . . . in my lifetime' did not include money placed in a joint bank account).

9 'Probate valuation' means the value given in the Inland Revenue affidavit leading to probate (*Re Eumorfopoulos, Ralli v Eumorfopoulos* [1944] Ch 133, [1943] 2 All ER 719), but 'valuation agreed for probate' means the valuation agreed ultimately with the fiscal authorities (*Re De Lisle's Will Trusts, White v De Lisle* [1968] 1 All ER 492, [1968] 1 WLR 322).

10 'Marriage' prima facie refers to a marriage valid in law: *Viscount Falkland v Bertie* (1698) 2 Vern 333 at 336; *Allen v Wood* (1834) 1 Bing NC 8; *Re M'Loughlin's Estate* (1878) 1 LR Ir 421, Ir CA.

11 'Unmarried' has no fixed meaning (*Pratt v Mathew* (1856) 22 Beav 328; *Clarke v Colls* (1861) 9 HL Cas 601), but is generally construed to mean 'never having been married' (*Heywood v Heywood* (1860) 29 Beav 9 at 16; *Re Sanders' Trusts* (1866) LR 1 Eq 675; *Dalrymple v Hall* (1881) 16 ChD 715; *Re Sergeant, Mertens v Walley* (1884) 26 ChD 575; *Roberts v Bishop of Kilmore* [1902] 1 IR 333; *Re Collyer, Collyer v Back* (1907) 24 TLR 117; *Re Hall-Dare, Le Marchant v Lee Warner* [1916] 1 Ch 272). See also *Re Thistlethwayte's Trust* (1855) 24 LJ Ch 712. It may mean 'not having a spouse living': *Clarke v Colls* (1861) 9 HL Cas 601; *Re Chant, Chant v Lemon* [1900] 2 Ch 345. See also *Re Jones, Last v Dobson* [1915] 1 Ch 246 (where 'unmarried and without leaving lawful issue' was held to mean 'widower', as otherwise the last five words were superfluous); and SETTLEMENTS vol 42 (Reissue) PARA 936. As to a gift to unmarried children see *Jubber v Jubber* (1839) 9 Sim 503; *Hall v Robertson* (1853) 4 De GM & G 781.

12 In a will executed before 1 January 1970 'minority' prima facie refers to the period up to 21 years of age (the date of death is not material nor is the construction affected by a codicil confirming the will executed on or after that date); but in wills executed on or after that date 'minority' prima facie refers to the period up to 18 years of age (see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1), but may refer to the traditional minority, ie the period up to 21 years of age, or the time during which the testator has kept the child out of full control of his property (*Milroy v Milroy* (1844) 14 Sim 48; *Fraser v Fraser* (1863) 1 New Rep 430). For the meaning of 'children' see PARA 621 et seq post.

13 These words may mean 'during the continuance of hostilities': *Re Cooper, Bendall v Cooper* [1946] Ch 109, [1946] 1 All ER 28. See also *Re Orchard, Carpenter v Lauer* [1948] 1 All ER 203 ('armistice').

14 'Simultaneous death' does not mean death in such circumstances that a physician would hold that death at the same moment of time had been proved (*Hickman v Peacey* [1945] AC 304, [1945] 2 All ER 215, HL, where it is doubted whether in this sense simultaneous death is possible), but death in such circumstances that the ordinary person would infer that death was simultaneous (see *Re Pringle, Baker v Matheson* [1946] Ch 124, [1946] 1 All ER 88). The expression is normally to be construed as a reference to time, and not to death as a result of the same calamity: *Re Rowland, Smith v Russell* [1963] Ch 1, [1962] 2 All ER 837, CA (death of wife 'preceding or coinciding with' testator's death). Cf *Re Harmer* (1964) 42 DLR (2d) 321, Ont CA (where a provision relating to simultaneous deaths was held to apply where the husband's death preceded that of the testatrix).

15 *Re Edwards' Will Trusts, Dalgleish v Leighton* [1948] Ch 440, [1948] 1 All ER 821, CA.

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538. Words referring to time.

It is a matter of construction of the whole will whether a particular clause is intended to speak from the testator's death, or from the date of the execution of the will¹ or some other time².

Where the testator uses words of futurity without clearly showing the time which he contemplates, and where it is not a question of the real and personal estate comprised in the will³, prima facie those words should be read as speaking from the date of his making the will and not from the date of his death⁴. In such a case, an event which happens before the date of the will is not within the clause in question, and a phrase such as 'persons who shall die in my lifetime' does not prima facie include persons already dead at the date of the will⁵.

The court is, however, especially ready to discover that the testator has fallen into the trap of using tenses ungrammatically and making references to time inaccurately⁶. In such cases the words are not construed in their strictly grammatical sense, but as referring to events which, even if they happened before the date of the will, are past at the testator's death⁷.

Where the context shows that the testator could not mean the time of making the will as the time contemplated by him, he must *prima facie* mean the time of his death⁸.

1 *Re Chapman, Perkins v Chapman* [1904] 1 Ch 431 at 440, CA, per Cozens-Hardy LJ; *affd sub nom Chapman v Perkins* [1905] AC 106, HL.

2 See *Re Bayliss's Trust* (1849) 17 Sim 178 ('such as are married', meaning 'such as shall be married at the date when the legacies are payable'). Thus a forfeiture clause may be intended to operate only after the testator's death: see *Re Evans, Hewitt v Edwards* [1940] Ch 629 ('ipso facto' showed that the testator contemplated only an act after his death).

3 As to real and personal estate the will generally speaks from death: see PARA 573 post. Descriptions of donees taking as individuals generally have reference to the date of the will: see PARA 591 post.

4 *Bullock v Bennett* (1855) 7 De GM & G 283; *Re Chapman, Perkins v Chapman* [1904] 1 Ch 431 at 436, CA, per Vaughan Williams LJ; *Re Fentem, Cockerton v Fentem* [1950] 2 All ER 1073.

5 See *Coulthurst v Carter* (1852) 15 Beav 421 at 430; *Gorringe v Mahlstedt* [1907] AC 225, HL; *Re Cope, Cross v Cross* [1908] 2 Ch 1, CA; *Re Brown, Leeds v Spencer* [1917] 2 Ch 232; *Re Hewitt, Hewitt v Hewitt* [1926] Ch 740; *Re Walker, Walker v Walker* [1930] 1 Ch 469, CA.

6 *Re Donald, Royal Exchange Assurance v Donald* [1947] 1 All ER 764 at 766, CA, per Lord Greene MR.

7 Thus 'persons who shall die in my lifetime' may mean 'persons who shall not be living at my death': *Loring v Thomas* (1861) 1 Drew & Sm 497 at 516; *Re Lambert, Corns v Harrison* [1908] 2 Ch 117 at 120; *Barraclough v Cooper* [1908] 2 Ch 121n at 126n. See also *Re Birchall, Re Valentine, Kennedy v Birchall* [1940] Ch 424, [1940] 1 All ER 545, CA; *Christopherson v Naylor* (1816) 1 Mer 320; *Re Williams, Metcalfe v Williams* [1914] 2 Ch 61, CA; *Re Kirk, Wethey v Kirk* (1915) 85 LJ Ch 182; *Re Rayner, Couch v Warner* (1925) 134 LT 141 ('shall live to attain 21' held to include child who had attained 21 at date of will); *Mackintosh (or Miller) v Gerrard* [1947] AC 461, HL (where the cases were reviewed); *Re Donald, Royal Exchange Assurance v Donald* [1947] 1 All ER 764, CA ('who shall have died in the lifetime of J' held to include persons dead before J was born). For similar cases on settlements see *Hewet v Ireland* (1718) 1 P Wms 426; *Manning v Chambers* (1847) 1 De G & Sm 282; *Barnes v Jennings* (1866) LR 2 Eq 448. Where the gift is to named individuals and not to a class, it is easier to suppose that the words are not to be taken in their strict sense: *Re Booth's Will Trusts, Robbins v King* (1940) 163 LT 77; *affd on other grounds* [1940] WN 293, CA.

8 *Lomax v Holmden* (1749) 1 Ves Sen 290 at 296. A devise of the proceeds of sale of such parts of an estate 'as have been sold' refers, in the absence of a contrary intention appearing in the will, to the date of the testator's death, and includes the proceeds received from sales made after the date of the will: *Re Davies, Scourfield v Davies* [1925] Ch 642. As to a contrary intention appearing in a will see PARA 573 post.

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539. Effect to be given to every word.

It is a general, but not inflexible¹, canon of construction that the will should be so construed that every word has effect². A word ought not to be disregarded if it can be given some meaning³ which is not contrary to the testator's intention plainly expressed in other parts of the will⁴, and it is not to be assumed that the testator has used additional words without some additional purpose or without any purpose at all⁵.

The rule is not adhered to where its application would defeat the testator's intention as collected from the context of the whole will⁶, and in such cases the words may be regarded as

merely explanatory, expressing what would otherwise have been true under the will⁷. There is no presumption that testators use the irreducible minimum of words to effect their purpose, or that each word should change the meaning of the sentence, and the objection of surplusage has weight only when the presence of the word or phrase would be unusual or unaccountable if it were not specially inserted for the purpose of altering the meaning of the sentence⁸. In particular, words are not to be given a meaning other than their ordinary meaning merely because they are in their ordinary meaning only surplusage⁹, or because other words, inconsistent with their use in that meaning but insufficient to give them a different meaning, may have to be rejected¹⁰.

1 See *Martin v Holgate* (1866) LR 1 HL 175 at 185 per Lord Cranworth LC (where the rule was countered by the rule that a gift should not be construed as contingent unless the context so requires). See also *Clarke v Colls* (1861) 9 HL Cas 601 at 613, 618.

2 *Blamford v Blamford* (1615) 3 Bulst 98 at 103 ('every string ought to give his sound'); *Barker v Giles* (1725) 2 P Wms 280 at 282; *King v Burchell* (1759) 1 Eden 424 at 432; *Collet v Lawrence* (1791) 1 Ves 268 at 269; *Thellusson v Woodford*, *Woodford v Thellusson* (1799) 4 Ves 227 at 329; *Milsom v Awdry* (1800) 5 Ves 465 at 467; *Doe d Tyrrell v Lyford* (1816) 4 M & S 550 at 558; *Hastings v Hane* (1883) 6 Sim 67 at 71; *Morrall v Sutton* (1845) 1 Ph 533 at 536; *Neathway v Reed* (1853) 3 De GM & G 18 at 23; *King v Cleaveland* (1859) 4 De G & J 477 at 488; *Clarke v Colls* (1861) 9 HL Cas 601 at 612 per Lord Cranworth; *Parker v Tootal* (1865) 11 HL Cas 143 at 159; *Best v Stonehewer* (1865) 2 De GJ & Sm 537 at 541; *Massy v Rowen* (1869) LR 4 HL 288 at 301 per Lord Cairns; *Re Sanford*, *Sanford v Sanford* [1901] 1 Ch 939 at 943; *Rickerby v Nicolson* [1912] 1 IR 343 at 347.

3 *Re Croxon*, *Croxon v Ferrers* [1904] 1 Ch 252 at 258 ('lawfully' assume, in name and arms clause). See also *Heasman v Pearse* (1871) 7 Ch App 275 at 283.

4 *Doe d Baldwin v Rawding* (1819) 2 B & Ald 441 at 448 per Abbott CJ, and at 451 per Holroyd J. See also *Reeves v Brymer* (1799) 4 Ves 692 at 698; *Constantine v Constantine* (1801) 6 Ves 100 at 102.

5 *Oddie v Woodford* (1821) 3 My & Cr 584 at 614 per Lord Cottenham LC; *Quarm v Quarm* [1892] 1 QB 184 at 186. See also *Foxwell v Van Grutten* (1900) 82 LT 272, HL.

6 *Sayer v Bradley* (1856) 5 HL Cas 873 at 899.

7 *M'Lachlan v Taitt* (1860) 2 De GF & J 449 at 454 per Lord Campbell LC. See also *Hicks v Sallitt* (1854) 3 De GM & G 782 at 794; *Re Walton's Estate* (1856) 8 De GM & G 173 at 175 per Knight Bruce LJ.

8 *Re Boden*, *Boden v Boden* [1907] 1 Ch 132 at 143, CA, per Fletcher Moulton LJ. See also *Clarke v Colls* (1861) 9 HL Cas 601 at 613 per Lord Cranworth ('the language of conveyancers is proverbially prolix and redundant').

9 *Monk v Mawdsley* (1827) 1 Sim 286 at 290-291; *Taylor v Beverley* (1844) 1 Coll 108 at 116; *Craik v Lamb* (1844) 1 Coll 489 at 493-494; *Re Kirkbride's Trusts* (1866) LR 2 Eq 400; *Giles v Melsom* (1873) LR 6 HL 24 at 33-34; *Palmer v Orpen* [1894] 1 IR 32 at 38; *Roberts v Bishop of Kilmore* [1902] 1 IR 333; *Re Hampton*, *Hampton v Mawer* (1918) 62 Sol Jo 585.

10 Even technical words may be given a meaning other than their technical meaning where they are inconsistent with the general intention (*Jesson v Wright* (1820) 2 Bli 1, HL; *Roddy v Fitzgerald* (1858) 6 HL Cas 823), but, unless the inconsistency is plain, the rules of construction must prevail (*Roddy v Fitzgerald* supra at 871 per Lord Cranworth).

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540. Presumption as to repeated words.

A canon of construction which is far from universal and always requires a good deal of care in its application¹ is that a word used in one part of the will with some clear and definite meaning

is intended to have the same meaning in another part of the will where its meaning is not clear².

The force of the context may, however, give different meanings to the same word when used in different parts of the will³. As the words must be construed with reference to the subject matter⁴, different meanings may be given to the same word or phrase when used both with reference to real property and with reference to personal property in the will, even in the same sentence⁵.

1 *Clifford v Koe* (1880) 5 App Cas 447 at 459, HL, per Lord Selborne LC.

2 *Re Birks, Kenyon v Birks* [1900] 1 Ch 417 at 418, CA, per Lindley MR. See also *Ridgeway v Munkittrick* (1841) 1 Dr & War 84 at 93 per Sugden LC; *Edwards v Edwards* (1849) 12 Beav 97 at 100 per Romilly MR; *Re Buckle, Williams v Marson* [1894] 1 Ch 286 at 288, CA. See, however, *Leeming v Sherratt* (1842) 2 Hare 14 at 25; *Rhodes v Rhodes* (1859) 27 Beav 413 at 417; *Haws v Haws* (1747) 3 Atk 524 at 526.

3 *Doe d Cock v Cooper* (1801) 1 East 229 at 233; *Right d Compton v Compton* (1808) 9 East 267 at 272-273; *Dalzell v Welch* (1828) 2 Sim 319 (issue); *Carter v Bentall* (1840) 2 Beav 551 at 558; *Head v Randall* (1843) 2 Y & C Ch Cas 231 (issue); *Hedges v Harpur* (1846) 9 Beav 479 (on appeal (1858) 3 De G & J 129) (issue); *Williams v Teale* (1847) 6 Hare 239 at 250 (issue); *Neathway v Reed* (1853) 3 De GM & G 18 at 22 (surviving); *Edyvean v Archer, Re Brooke* [1903] AC 379, PC (issue). See also *Re Warren's Trusts* (1884) 26 ChD 208 at 216 per Pearson J (settlement).

4 *Williams v Jekyl, Elliot v Jekyl* (1755) 2 Ves Sen 681 at 683.

5 *Forth v Chapman* (1720) 1 P Wms 663 at 667; *Doe d Chattaway v Smith* (1816) 5 M & S 126 at 132.

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541. Ejusdem generis rule.

The ejusdem generis rule¹ as to the meaning of general words following a series of specific descriptions applies to wills as to other instruments, and applies to descriptions of persons and things as well as to descriptions of property². The rule readily gives way to any context showing a contrary intention, and may be overridden by the presumption against intestacy³, so that, where the general words occur in a clause of the nature of a residuary gift, the ordinary, wider meaning of the words is adhered to⁴. This consideration does not, however, assist where the general words would in their wider meaning carry a residuary estate which is dealt with by another clause of the will⁵.

1 As to the ejusdem generis rule generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 234. For examples of the application of the rule to wills see *Trafford v Berrige* (1729) 1 Eq Cas Abr 201 pl 14 ('other things'); *Timewell v Perkins* (1740) 2 Atk 102 ('etc, or in any other thing'); *Stuart v Marquis of Bute* (1813) 1 Dow 73, HL ('things'); *Wrench v Jutting* (1841) 3 Beav 521 ('other goods'); *Lamphier v Despard* (1842) 2 Dr & War 59 ('other chattel property'); *Barnaby v Tassell* (1871) LR 11 Eq 363 at 369 ('etc'); *Re Lord Londesborough, Bridgeman v Lord Fitzgerald* (1880) 43 LT 408 ('objects of vertu or taste'); *Re Layard, Layard v Earl of Bessborough* (1916) 85 LJ Ch 505, CA ('portraits of myself and all my family and other portraits') (appeal withdrawn on terms (1917) 33 TLR 261, HL); *Re Taylor, Barber v Smith* (1919) 147 LT Jo 253 ('jewellery and other articles of personal or domestic use or ornament' held to include furniture); *Malone v Malone* [1925] 1 IR 140, Ir CA ('and effects of every kind'); *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514, [1967] 3 All ER 915, PC ('other personal jewellery'). As to the construction of 'etc' see further *Steignes v Steignes* (1730) Mos 296; *Marquis of Hertford v Lord Lowther* (1843) 7 Beav 1; *Twining v Powell* (1845) 2 Coll 262; *Chapman v Chapman* (1876) 4 ChD 800; *Re Andrew's Estate, Creasey v Graves* (1902) 50 WR 471 (real estate included). For examples where the general words were held to retain their ordinary significance see *Kendall v Kendall* (1828) 4 Russ 360; *Arnold v Arnold* (1834) 2 My & K 365 ('my wines and property in England'); *Ellis v Selby* (1835) 7 Sim 352 at 364; *Re Kendall's*

Trusts (1851) 14 Beav 608 ('everything I die possessed of, namely . . .'); *Fisher v Hepburn* (1851) 14 Beav 626; *Everall v Browne* (1853) 1 Sm & G 368 ('other property, goods, and articles'). As to the effect of a gift of 'effects' see PARA 579 post. Although it is more difficult to infer that general words are cut down if there is an enumeration of only one species, or a slender enumeration of species of particulars (*Swinfen v Swinfen* (No 4) (1860) 29 Beav 207; *Campbell v M'Grain* (1875) IR 9 Eq 397 at 400 per Sullivan MR), there is no rule that general words cannot be cut down in those circumstances (*Northey v Paxton* (1888) 60 LT 30; *Re O'Brien, O'Brien v O'Brien* [1906] 1 IR 649 at 653, Ir CA).

2 For examples in investment clauses see *Edwards v Thompson* (1868) 38 LJ Ch 65 ('any railway' restricted to United Kingdom railways); *Re Castlehow, Lamonby v Carter* [1903] 1 Ch 352 ('any railway or other public company' restricted to United Kingdom railways). Cf *Re Stanley, Tennant v Stanley* [1906] 1 Ch 131 (where the context excluded any restriction).

3 *Gibbs v Lawrence* (1860) 30 LJ Ch 170 at 171. See also *Re Kendall's Trust* (1851) 14 Beav 608; *Dean v Gibson* (1867) LR 3 Eq 713 (following *Bridges v Bridges* (1729) 8 Vin Abr, Devise (Ob) 295 pl 13; *Chalmers v Storil* (1813) 2 Ves & B 222 (cases of enumeration of particulars, 'viz' or 'consisting of')); *Chapman v Chapman* (1876) 4 ChD 800; *King v George* (1877) 5 ChD 627, CA; *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594; *Re Recknell, White v Carter* [1936] 2 All ER 36. As to the presumption against intestacy see PARA 546 post.

4 *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 301; *Hodgson v Jex* (1876) 2 ChD 122; *Re Parrott, Parrott v Parrott* (1885) 53 LT 12.

5 *Woolcomb v Woolcomb* (1731) 3 P Wms 112; *Mullins v Smith* (1860) 1 Drew & Sm 204; *Smith v Davis* (1866) 14 WR 942, CA; *Campbell v M'Grain* (1875) IR 9 Eq 397; *Re Miller, Daniel v Daniel* (1889) 61 LT 365; *MacPhail v Phillips* [1904] 1 IR 155.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/542. Clear words not controlled by subsequent ambiguous words.

542. Clear words not controlled by subsequent ambiguous words.

Subject to the intention shown by the whole will¹, it is a leading principle of construction² that words clear and unambiguous in themselves³ cannot be qualified by other words unless those other words show a very clear exposition of the testator's meaning⁴; nor can the effect of such words be set aside because there is a reason to suppose that they do not produce the effect which the testator intended that they should produce⁵. In the endeavour to read the will as a consistent whole and to reconcile the various clauses with each other⁶, a prior gift is not disturbed by a later gift in the same or a subsequent testamentary instrument further than is necessary to give effect to the intentions of the testator shown by reading the will, including all codicils, as a whole⁷.

1 See *Re Bagshaw's Trusts* (1877) 46 LJ Ch 567 at 569, CA.

2 *Goodwin v Finlayson* (1858) 25 Beav 65 at 68 per Romilly MR.

3 As to the position where the words are ambiguous see PARAS 483, 506 ante.

4 *Broughton v Broughton, Broughton v James* (1848) 1 HL Cas 406 at 434 per Lord Cottenham LC. See also *Doe d Hearle v Hicks* (1832) 8 Bing 475, HL; *Bickford v Chalker* (1854) 2 Drew 327; *Kerr v Baroness Clinton* (1869) LR 8 Eq 462; *Conmy v Cawley* [1910] 2 IR 465, Ir CA.

5 *Earl Hardwicke v Douglas* (1840) 7 Cl & Fin 795 at 815, HL.

6 See PARA 523 ante.

7 *Doe d Hearle v Hicks* (1832) 8 Bing 475 at 480, HL; *Young v Hassard* (1841) 1 Dr & War 638 at 644; *Doe d Evers v Ward* (1852) 18 QB 197 at 223; *Williams v Evans* (1853) 1 E & B 727 at 740; *Wallace v Seymour* (1872) IR 6 CL 219 at 343-344, Ir Exch; *Pennefather v Lloyd* [1917] 1 IR 337; *Re Florence, Lydall v Haberdashers' Co* (1917) 87 LJ Ch 86; *Re Atkinson, Atkinson v Weightman* [1925] WN 30, CA; *Re Bund, Cruickshank v Willis* [1929]

2 Ch 455 at 464. See also *Stewart v Maclaren* (1920) 57 SLR 531; *Re Crawshay, Hore-Ruthven v Public Trustee* [1948] Ch 123, [1948] 1 All ER 107, CA; *Pratt v Pratt* (1844) 14 Sim 129. As to reading the will and codicils as one disposition see PARA 513 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/543. Effect of recitals or other statements.

543. Effect of recitals or other statements.

A recital or other statement, unless obviously erroneous, may be referred to by way of explanation of a gift in itself doubtful or ambiguous¹. Where, however, the operative part is clear, it cannot be cut down by a recital². A recital showing that the testator is under the impression that he has in his will made a certain disposition is evidence of an intention, inadvertently not expressed, to make that gift³. In such a case, effect will be given to the intention if the other provisions of the will allow this to be done⁴, and the inference from the recital may be sufficient to overcome and correct the terms of an express gift to the person in question⁵. The court must, however, be satisfied that there has been a mistake in carrying out the testator's intention⁶, or the recital is treated as erroneous and disregarded⁷.

Mere words of erroneous recital or recognition of indebtedness or of affection do not disclose an intention of making a gift⁸, and a recital showing that the testator considered that some person possessed a title to property independent of that of the testator *prima facie* gives rise to the inference that he did not intend to make a disposition in favour of that person⁹.

1 *Pullin v Pullin* (1825) 10 Moore CP 464; *Darley v Martin* (1853) 13 CB 683; *Grover v Raper* (1856) 5 WR 134 (followed in *Re Venn, Lindon v Ingram* [1904] 2 Ch 52). As to inaccurate recitals of the indebtedness of a donee, and as to the effect of a direction to bring sums into hotchpot see PARA 690 post.

2 *Culsha v Cheese* (1849) 7 Hare 236; *Savile v Kinnaird* (1865) 11 Jur NS 195. As to reference to recitals in deeds for purposes of construction see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217 et seq.

3 *Adams v Adams* (1842) 1 Hare 537 at 541; *Re Smith* (1862) 2 John & H 594 at 598-599.

4 *Bibin v Walker* (1768) Amb 661; *Farrer v St Catharine's College, Cambridge* (1873) LR 16 Eq 19 at 24; *Re Yates, Singleton v Povah* (1922) 128 LT 619. See also *Law's Trustees v Gray* 1921 SC 455 (no bequests by implication where contrary to the general scheme).

5 *Jordan v Fortescue* (1847) 10 Beav 259. See also *Milner v Milner* (1748) 1 Ves Sen 106; *Re Margitson, Haggard v Haggard* (1882) 48 LT 172, CA.

6 *Thompson v Whitelock* (1859) 4 De G & J 490 at 500. See also *Smith v Fitzgerald* (1814) 3 Ves & B 2 at 8 per Grant MR. As to the possibility of rectification of the will see PARA 408 ante.

7 *Gordon v Hoffman* (1834) 7 Sim 29; *Mann v Fuller* (1854) Kay 624; *Re Arnold's Estate* (1863) 33 Beav 163 at 171; *Mackenzie v Bradbury* (1865) 35 Beav 617 at 620; *Ives v Dodgson* (1870) LR 9 Eq 401.

8 *Re Rowe, Pike v Hamlyn* [1898] 1 Ch 153 at 160, CA. See also *Dashwood v Peyton* (1811) 18 Ves 27 at 46; *Murdoch v Brass* (1904) 6 F 841.

9 *Adams v Adams* (1842) 1 Hare 537 at 540-541. See also *Ralph v Watson* (1840) 9 LJ Ch 328; *A-G v Dillon* (1862) 13 Ch R 127 at 133; *Re Bagot, Paton v Ormerod* [1893] 3 Ch 348, CA; *Re Lee, Gibbon v Peele* (1910) 103 LT 103; *Re Angus's Will Trusts, Hall v Angus* [1960] 3 All ER 835, [1960] 1 WLR 1296. Cf *Poulson v Wellington* (1729) 2 P Wms 533; *Wilson v Piggott* (1794) 2 Ves 351 at 355 (cases of settlements).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/544. Alteration of the words of the will.

544. Alteration of the words of the will.

Where the testator's main purpose and intention are ascertained to the satisfaction of the court, then, if particular expressions are found in the will which are inconsistent with that intention, although not sufficient to control it, or which indicate an intention which the law does not permit to take effect, the expressions may be discarded or modified by the court¹. Thus words and limitations² may be supplied³, changed⁴, transposed⁵ or rejected⁶ where this is justified by the immediate context or the general scheme of the will, particularly where it is plain that a mistake has occurred⁷. Before supplying words, however, the court must be satisfied not only that certain words have been omitted, but that it is certain what words have been omitted⁸. No alteration may be made to the words of the will unless it is necessary⁹, nor may an alteration be made merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument¹⁰. Where any part of the will of a testator dying on or after 1 January 1983 is meaningless, extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation¹¹.

1 *Towns v Wentworth* (1858) 11 Moo PCC 526 at 543. If the circumstances require it, even a forfeiture clause will be remodelled by the court: *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA, explaining *Re Murray, Martins Bank Ltd v Dill* [1955] Ch 69 at 79, [1954] 3 All ER 129 at 134, CA (where this had been doubted).

2 As to gifts by implication arising under this rule see PARA 752 post.

3 *Spalding v Spalding* (1630) Cro Car 185 (gift over on death of eldest son in life of wife; 'without issue' supplied); *Doe d Leach v Micklem* (1805) 6 East 486; *Langston v Langston* (1834) 2 Cl & Fin 194, HL; *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 ('in the event of my son dying'; 'without children' supplied); *Parker v Tootal* (1865) 11 HL Cas 143 ('first son of T severally and successively in tail male'; 'and other sons' introduced); *Re Hunt, Davies v Hetherington* (1890) 62 LT 753 (to sons at 21 and to daughters 'who shall marry under that age'; the words 'shall attain that age or' introduced); *Re Wroe, Frith v Wilson* (1896) 74 LT 302; *Comiskey v Bowring-Hanbury* [1905] AC 84, HL ('in default of any disposition' construed as meaning in default of any disposition in favour of members of particular class); *Munro v Henderson* [1907] 1 IR 440 (affd [1908] 1 IR 260, Ir CA). See also *Newburgh v Newburgh* (1825) Sugden's Law of Property 367, HL; *Re Broadwell, Mackenzie v Readman* (1912) 134 LT Jo 107; *Re Haygarth, Wickham v Haygarth* [1913] 2 Ch 9; *Re Birkin, Heald v Millership* [1949] 1 All ER 1045 (gift to 'all nephews and nieces of my late sister L'; 'children' inserted after 'nephews and nieces'). See also the cases cited in PARA 545 note 4 post.

4 *Dent v Pepys* (1822) 6 Madd 350 (name of donee changed); *Hart v Tulk* (1852) 2 De GM & G 300 ('fourth' schedule changed to 'fifth'); *Re Northen's Estate, Salt v Pym* (1884) 28 ChD 153 (ultimate limitation changed, 'estate' being read 'C estate'); *Re Dayrell, Hastie v Dayrell* [1904] 2 Ch 496 (in a direction against vesting of settled chattels in a son or any person made tenant for life, 'or' was read 'of').

5 *Luxford v Cheeke* (1683) 3 Lev 125; *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61 at 74 per Lord Hardwicke LC; *Marshall v Hopkins* (1812) 15 East 309; *Chambers v Brailsford* (1816) 19 Ves 652 at 653 per Lord Eldon LC (to make sense of a will otherwise meaningless, and to make it take some effect rather than be totally void); *Hudson v Bryant* (1845) 1 Coll 681 at 685; *Re Bacharach's Will Trusts, Minden v Bacharach* [1959] Ch 245, [1958] 3 All ER 618 (transposition of trusts declared of different parts of residuary estate).

6 *Haws v Haws* (1747) 3 Atk 524 at 525; *Smith v Pybus* (1804) 9 Ves 566; *Sherratt v Bentley* (1834) 2 My & K 149 at 157, 166; *Jones v Price* (1841) 11 Sim 557 at 569; *Pasmore v Huggins* (1855) 21 Beav 103; *Smith v Crabtree* (1877) 6 ChD 591; *Smidmore v Smidmore* (1905) 3 CLR 344. See also *Ellard v Phelan* [1914] 1 IR 76 ('hereinafter').

7 *Sims v Doughty* (1800) 5 Ves 243 at 247; *Re MacAndrew's Will Trusts, Stephens v Barclays Bank Ltd* [1964] Ch 704, [1963] 2 All ER 919 (words 'or widow' in an otherwise plain scheme of disposition rejected as 'a senseless and incongruous insertion'). Where either or any of two or more alterations may be satisfactory, the

court has to inquire which in the circumstances is most probably the intention: *Mason v Baker* (1856) 2 K & J 567; *Wills v Wills* (1875) LR 20 Eq 342.

8 *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643 at 677-678, [1962] 2 All ER 335 at 353, CA, per Upjohn LJ. See also *Re Follett, Barclays Bank Ltd v Dovell* [1955] 2 All ER 22, [1955] 1 WLR 429, CA; *Re Whitrick, Sutcliffe v Sutcliffe* [1957] 2 All ER 467, [1957] 1 WLR 884, CA.

9 *Eden v Wilson* (1852) 4 HL Cas 257 at 284; *Peacock v Stockford* (1853) 3 De GM & G 73 at 77; *Abbott v Middleton* (1855) 21 Beav 143 at 149 per Romilly MR (when the change or insertion 'is required to give to the whole sentence one uniform and consistent meaning, which without it would be irrational or repugnant', it must be made) (on appeal (1858) 7 HL Cas 68 at 94 per Lord St Leonards); *Lady Langdale v Briggs, ex p Lady Bacon, ex p Martineau* (1873) 28 LT 467 at 469 (affd sub nom *Martineau v Briggs* (1875) 45 LJ Ch 674, HL). In *Hope v Potter* (1857) 3 K & J 206 at 209, Wood V-C classified the cases of supplying words into two categories: (1) where there is a necessary implication to avoid an intestacy; (2) where a contingent limitation over is curtailed by, or is to be reconciled with, a previous gift, such as cases where 'in default of issue' has been read 'in default of such issue' (see PARA 740 post).

10 *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 81, 114; *Mellor v Daintree* (1886) 33 ChD 198 at 205. See also *Hope v Potter* (1857) 3 K & J 206; *Campbell v Bouskell* (1859) 27 Beav 325; *Re Mitchell, Mitchell v Mitchell* (1913) 108 LT 180; *Re Caldwell's Will Trusts, Jenyns v Sackville West* [1971] 1 All ER 780, [1971] 1 WLR 181.

11 See the Administration of Justice Act 1982 s 21(1)(a), (2); and PARA 483 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(ii) Context, Meaning and Effect of Words/545. Examples of changing or supplying words.

545. Examples of changing or supplying words.

Where two clauses in a will run parallel to each other (as in the case of clauses settling the separate share of the donees), except for a difference which may have been caused by the omission of some words or other mistake in copying, the court may change the wording or supply the missing words¹. Further, the scheme of the will as a whole may be sufficiently clear for its spirit to overcome the letter of a particular clause, leading to the necessity of making a suitable implication in the language². Even in such a case, however, the court refuses to make any alteration where the clauses, read as they stand, are clear and unambiguous and the suggestion of mistake rests only on conjecture³.

Another example is where a power of appointment, or trust in default of appointment, is inadvertently omitted, but the court is able to determine what the omitted words were⁴.

There are many cases where 'and' has been changed by the court into 'or'⁵, and vice versa⁶.

1 *Re Redfern, Redfern v Bryning* (1877) 6 ChD 133; *Re Northen's Estate, Salt v Pym* (1884) 28 ChD 153; *Phillips v Rail* (1906) 54 WR 517. As to the possibility of rectification see PARA 408 ante.

2 *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713, applying the authorities relating to secondary interpretation of the language used. See also PARA 533 ante.

3 *Crawford's Trustees v Fleck* 1910 SC 998.

4 *Re Cory, Cory v Morel* [1955] 2 All ER 630, [1955] 1 WLR 725; *Re Riley's Will Trusts, Riley v Riley* [1962] 1 All ER 513, [1962] 1 WLR 344. As to gifts by implication see PARA 752 post.

5 *Haws v Haws* (1747) 1 Ves Sen 13; *Jackson v Jackson* (1749) 1 Ves Sen 217; *Burleigh v Pearson* (1749) 1 Ves Sen 281; *Stubbs v Sargon* (1837) 2 Keen 255 at 273; *Stapleton v Stapleton* (1852) 2 Sim NS 212; *Maynard v Wright* (1858) 26 Beav 285 (where the alternative was that the will was void for uncertainty). For instances where the court declined to make the change see *Malden v Maine* (1855) 2 Jur NS 206; *Grey v Pearson* (1857) 6 HL Cas 61; *Secombe v Edwards* (1860) 28 Beav 440; *Earl of Malmesbury v Countess of Malmesbury, Phillipson*

v Turner (1862) 31 Beav 407; *Coates v Hart* (1863) 32 Beav 349 (on appeal 3 De GJ & Sm 504 at 516); *Barker v Young* (1864) 33 Beav 353; *Re Sanders' Trusts* (1866) LR 1 Eq 675. See further PARA 729 post.

6 *Nichols v Tolley* (1700) 2 Vern 388; *Read v Snell* (1743) 2 Atk 642 at 645; *Eccard v Brooke* (1790) 2 Cox Eq Cas 213; *Denn d Wilkins v Kemeys* (1808) 8 East 366; *Horridge v Ferguson* (1822) Jac 583; *Green v Harvey* (1842) 1 Hare 428; *Parkin v Knight* (1846) 15 Sim 83; *Lachlan v Reynolds* (1852) 9 Hare 796 at 798 (to 'children living at that period or their heirs'); *Shand v Kidd* (1854) 19 Beav 310 (to a class, or the issue of those then dead); *Maude v Maude* (1856) 22 Beav 290; *Greenway v Greenway* (1860) 2 De GF & J 128 at 129. For cases of the enumeration disjunctively of the objects of a power of appointment see *Brown v Higgs* (1799) 4 Ves 708 (reheard (1800) 5 Ves 495; affd (1801) 8 Ves 561; (1813) 18 Ves 192, HL); *Longmore v Broom* (1802) 7 Ves 124; *Penny v Turner* (1846) 15 Sim 368; *Salisbury v Denton* (1857) 3 Jur NS 740; *Re White's Trusts* (1860) John 656. See also the cases cited in PARA 611 note 5 post. In *Re Hayden, Pask v Perry* [1931] 2 Ch 333, where there was a gift to a class of persons 'or their issue', the change of 'or' into 'and' enabled 'their issue' to be read as words of limitation, and, there being three members of the class, each took an estate tail in an undivided third part. As it is not possible to create entailed interests by wills or other instruments coming into operation on or after 1 January 1997 (see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 119), this solution is no longer available: see PARA 671 post.

For instances where the court refused to change 'or' into 'and' see *Whitcher v Penley* (1846) 9 Beav 477; *Penley v Penley* (1850) 12 Beav 547; *Blundell v Chapman* (1864) 33 Beav 648 (all cases of substitutional gifts to children). See further PARA 611 post. See also *Hawksworth v Hawksworth* (1858) 27 Beav 1; *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206. As to the change of 'or' into 'and' in cases of gifts over see PARA 728 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/A. PRESUMPTION AGAINST INTESTACY/546. Presumption in doubtful cases.

(iii) Presumptions

A. PRESUMPTION AGAINST INTESTACY

546. Presumption in doubtful cases.

A testator may well intend to die partially intestate, for, when he makes a will, he is testate only so far as he has expressed himself in his will¹. Accordingly, there is no reason for the court in all cases to lean too heavily against a construction which involves a partial intestacy². Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or even partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion³. Where the will shows an intention of the testator to dispose of the whole of his property, but, as regards the interests created, two constructions are possible, according to one of which the will effects a complete disposition of the whole, but according to the other the will leaves a gap, the court inclines to the former construction⁴.

Although the avoidance of intestacy is to be regarded in construing doubtful expressions, it is not enough to induce the court to give an unnatural meaning to a word, or to construe plain words otherwise than according to their plain meaning⁵.

1 *Re Edwards, Jones v Jones* [1906] 1 Ch 570 at 574, CA, per Romer LJ. See also *Jackson v Craig* (1851) 20 LJ Ch 204 (property wholly undisposed of); *Webber v Stanley* (1864) 16 CBNS 698 at 760.

2 *Re Wragg, Hollingsworth v Wragg* [1959] 2 All ER 717 at 723, [1959] 1 WLR 922 at 929, CA, per Lord Evershed MR.

3 *Doe d Wall v Langlands* (1811) 14 East 370 at 372-373; *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 40-41; *Re Redfern, Redfern v Bryning* (1877) 6 ChD 133 at 136; *Re Harrison, Turner v Hellard* (1885) 30 ChD 390 at 393, CA, per Lord Esher MR; *Kirby-Smith v Parnell* [1903] 1 Ch 483 at 489; *Re Messenger's Estate, Chaplin v Ruane* [1937] 1 All ER 355; *Re Turner, Carpenter v Staveley* [1949] 2 All ER 935; *Re Stevens, Pateman v James*

[1952] Ch 323, [1952] 1 All ER 674. See also *Re Bassett's Estate, Perkins v Fladgate* (1872) LR 14 Eq 54 at 57. For examples of references to the leaning against intestacy in doubtful cases see *Royle v Hamilton* (1799) 4 Ves 437 at 439; *Vauchamp v Bell* (1822) 6 Madd 343 at 348; *Dobson v Banks* (1863) 32 Beav 259 at 260; *Re Salter, Farrant v Carter* (1881) 44 LT 603 at 604; *Re Henton, Henton v Henton* (1882) 30 WR 702; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314 at 319; *Re Lady Monck's Will, Monck v Croker* [1900] 1 IR 56, Ir CA. The presumption yielded to the clear words of the will in *Hodgson v Clare* [1999] All ER (D) 359, sub nom *Re Owen, Hodgson v Clare* [2002] WTLR 619.

4 *Ibbetson v Beckwith* (1735) Cas temp Talb 157 at 161. See also *Pinney v Marriott* (1863) 32 Beav 643.

5 *Re Benn, Benn v Benn* (1885) 29 ChD 839 at 847, CA; *Re Edwards, Jones v Jones* [1906] 1 Ch 570 at 574, CA; *Re Powell, Bodvel-Roberts v Poole* [1918] 1 Ch 407.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/A. PRESUMPTION AGAINST INTESTACY/547. Force of presumption.

547. Force of presumption.

The force of the presumption against intestacy varies according to the context and the circumstances¹. It applies especially to property which the testator has at the date of the will, but is not so strong as regards property which he has not yet acquired at that date². Introductory statements setting out the testator's intention to dispose of all his worldly estate³, or the appointment of executors⁴, or the fact that the objects of the testator's bounty are his wife and all his children, his eldest son being treated alike with the rest⁵, are strong indications in favour of a universal disposition of all the testator's property.

The presumption applies with particular force to the construction of a residuary gift; where the residue is given, every presumption is made that the testator did not die intestate⁶.

Where, according to one of several possible constructions of the words, a gift would be void for illegality⁷ and a partial intestacy would arise, then, unless it is possible to resolve the difficulty in reliance on direct evidence of intention⁸, the presumption against intestacy is an additional reason for an alternative construction which would avoid the illegality⁹.

1 See *Hall v Hall* [1892] 1 Ch 361 at 367, CA. Formerly, in the case of a devise of the whole legal fee simple of freehold land to trustees, there was an inference in favour of a complete disposition of the equitable interest (*Cuthbert v Robinson* (1882) 51 LJ Ch 238; cf para 660 note 3 post), but now the devise of a legal estate must be of the whole fee simple (see REAL PROPERTY vol 39(2) (Reissue) PARA 45; SETTLEMENTS vol 42 (Reissue) PARA 609; TRUSTS vol 48 (2007 Reissue) PARA 605).

2 *Re Methuen and Blore's Contract* (1881) 16 ChD 696 at 698-699.

3 *Ibbetson v Beckwith* (1735) Cas temp Talb 157; *Jackson v Hogan* (1776) 3 Bro Parl Cas 388; *Goodright d Baker v Stocker* (1792) 5 Term Rep 13; *Doe d Bates v Clayton* (1806) 8 East 141 at 147; *Doe d Wall v Langlands* (1811) 14 East 370 at 372; *Pocock v Bishop of Lincoln* (1821) 6 Moore CP 159; *Hughes v Pritchard* (1877) 6 ChD 24 at 27, CA.

4 *Re Bassett's Estate, Perkins v Fladgate* (1872) LR 14 Eq 54 at 57. See also *Re Messenger's Estate, Chaplin v Ruane* [1937] 1 All ER 355; *Re Turner, Carpenter v Staveley* [1949] 2 All ER 935; but see *Re Stevens, Pateman v James* [1952] Ch 323, [1952] 1 All ER 674 ('I give, devise and bequeath unto' three named persons; no reference to property given; testatrix held to have intended to give all her property although no executors were appointed).

5 *Hall v Hall* [1892] 1 Ch 361 at 367, CA. See also *Lachlan v Reynolds* (1852) 9 Hare 796 at 799; *O'Toole v Browne* (1854) 3 E & B 572 at 585.

6 *Philipps v Chamberlaine* (1798) 4 Ves 51 at 59; *Booth v Booth* (1799) 4 Ves 399 at 407; *Milsom v Awdry* (1800) 5 Ves 465 at 466; *Bolger v Mackell* (1800) 5 Ves 509 at 513; *Leake v Robinson* (1817) 2 Mer 363 at 386; *Goodman v Goodman* (1847) 1 De G & Sm 695 at 699; *Wiggins v Wiggins* (1852) 2 Sim NS 226 at 233; *Re*

Liverpool Dock Acts, Re Colshead's Will Trusts (1852) 2 De G & J 690 at 692; *Bentley v Oldfield* (1854) 19 Beav 225 at 232; *Gosling v Gosling* (1859) John 265 at 274; *Fay v Fay* (1880) 5 LR 1r 274 at 282.

7 As to the presumption against illegality see PARA 549 post.

8 As to the admissibility of extrinsic evidence of intention in cases of patent ambiguity see PARAS 483, 507-508 ante.

9 *Montgomerie v Woodley* (1800) 5 Ves 522; *Taylor v Frobisher* (1852) 5 De G & Sm 191 at 199; *Re Edmondson's Estate* (1868) LR 5 Eq 389; *Re Bevan's Trusts* (1887) 34 ChD 716 at 718; *Re Coppard's Estate, Howlett v Hodson* (1887) 35 ChD 350 (as explained in *Re Wenmoth's Estate, Wenmoth v Wenmoth* (1887) 37 ChD 266 at 270).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/A. PRESUMPTION AGAINST INTESTACY/548. Limits of presumption.

548. Limits of presumption.

The presumption against intestacy gives no assistance to the court where the contest is not between testacy and intestacy, but between two gifts in the same will¹. Further, it is not enough to satisfy the court that intestacy was not intended; in order to oust the title of the persons claiming on intestacy, it must be shown distinctly that there are words in the will sufficient to constitute a gift of the property in question², expressly or by implication, to some particular donee³, and the burden of proof is on the alleged donee⁴. However, once it is shown that the testator has manifested an intention of making some gift of the property, and thus excluding the persons entitled on intestacy to a certain extent, there is an end of the claim of those persons, except on the construction of the gift⁵, and, if the gift *prima facie* extends to the whole property, the burden of proof is then shifted to those claiming on intestacy to show to what extent the gift is limited⁶.

Before 1 January 1926 it was a rule of law, and not merely a rule of construction⁷, that the heir-at-law was not to be disinherited, nor were the next of kin to be deprived of their statutory right of succession, except by express words or necessary implication in the will. If the will was to have the effect of disinheriting the heir or depriving the next of kin⁸, it was necessary for the will to show the testator's intention to leave his property to someone else⁹ in such a way that there was certainty both in the subjects and objects of the gift and the manner in which the gift took effect¹⁰. A gift uncertain in any of these respects was void¹¹.

1 *Re Price, Price v Newton* [1905] 2 Ch 55 at 58 per Farwell J.

2 *Enohin v Wylie* (1862) 10 HL Cas 1 at 18, 21.

3 *Hall v Warren* (1861) 9 HL Cas 420 at 433, 435. See also *Drake v Drake* (1860) 8 HL Cas 172 at 180; *Re Hobson, Barwick v Holt* [1912] 1 Ch 626 at 634; *Re Wynn, Landolt v Wynn* [1983] 3 All ER 310, sub nom *Re Wynn* [1984] 1 WLR 237. As to gifts by implication see PARA 752 et seq post.

4 *Wilce v Wilce* (1831) 7 Bing 664 at 672; *Hall v Warren* (1861) 9 HL Cas 420 at 435.

5 *Awse v Melhuish* (1780) 1 Bro CC 519 at 522 (devise prior to the Wills Act 1837 s 28 (as amended) (see PARA 658 post)).

6 *Midland Counties Rly Co v Oswin* (1844) 1 Coll 74 at 78 per Knight Bruce V-C.

7 *Doe d Hick v Dring* (1814) 2 M & S 448 at 454 per Lord Ellenborough CJ; *Hall v Warren* (1861) 9 HL Cas 420 at 436. Regarded as a rule of construction, this rule would be in favour of intestacy, whereas the true presumption is against intestacy: see PARA 546 ante.

8 Where a testator by a codicil revoked a bequest of a share of his residuary estate to one of his sons and substituted a bequest of a settled legacy which he directed to sink into his residuary estate if his son had no children, but so that his son or his representatives should take no share or interest in it, the son was not excluded from sharing as one of the testator's next of kin in the share of residue undisposed of: *Sykes v Sykes* (1868) 3 Ch App 301. Where a will gave legacies to the testator's next of kin and declared that, if the next of kin made any further claim on the testator's estate, all that was given to them should be null and void, the next of kin did not forfeit their legacies by claiming residue undisposed of: *A-G v Parkin* (1769) Amb 566. A clause merely directing that personalty is to devolve or pass to persons successively as realty is in itself inoperative: *Re Walker, Mackintosh-Walker v Walker* [1908] 2 Ch 705 at 712. A clause excluding certain of the next of kin may be capable of being construed as a gift to the persons entitled on intestacy, excluding the named persons: *Vachell v Breton* (1706) 5 Bro Parl Cas 51. HL; *Bund v Green* (1879) 12 ChD 819; *Re Wynn, Landolt v Wynn* [1983] 3 All ER 310, sub nom *Re Wynn* [1984] 1 WLR 237. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 602.

9 *Hall v Warren* (1861) 9 HL Cas 420 at 428, 433, 435. See also *Thomas d Evans v Thomas* (1796) 6 Term Rep 671 at 676-677; *Pickering v Lord Stamford* (1797) 3 Ves 492 at 493; *Doe d Cock v Cooper* (1801) 1 East 229 at 236 (referring to the rule as the rule in *Comber v Hill* (1734) 2 Stra 699); *Constantine v Constantine* (1801) 6 Ves 100 at 102; *Kellett v Kellett* (1815) 3 Dow 248 at 254, HL; *Doe d Ashforth v Bower* (1832) 3 B & Ad 453 at 459; *Fitch v Weber* (1848) 6 Hare 145; *Underwood v Wing* (1855) 4 De GM & G 633 at 658 (affd sub nom *Wing v Angrave* (1860) 8 HL Cas 183); *Milsome v Long* (1857) 3 Jur NS 1073 at 1074; *Ferguson v Ferguson* (1878) 2 SCR 497 at 520; *Hall v Hall* [1892] 1 Ch 361 at 365, CA.

10 *Mohun v Mohun* (1818) 1 Swan 201; *A-G v Sibthorp* (1830) 2 Russ & M 107; *Richardson v Watson* (1833) 4 B & Ad 787; *Hoffman v Hankey* (1834) 3 My & K 376; *Curtis v Lukin* (1842) 5 Beav 147 at 156; *Flint v Warren* (1847) 15 Sim 626; *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158; *Buckley v Buckley* (1888) 19 LR Ir 544; *Re Moore, Prior v Moore* [1901] 1 Ch 936. As to uncertainty as to the donee see PARA 347 ante; and TRUSTS vol 48 (2007 Reissue) PARA 608.

11 As to construction with regard to uncertainty see PARAS 554-558 post. A condition may be void for uncertainty, and the gift may take effect free from the condition: see PARAS 421, 429-432 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/B. PRESUMPTIONS OF LEGALITY AND OF KNOWLEDGE OF THE TESTATOR/549. No departure from plain words to escape illegality.

B. PRESUMPTIONS OF LEGALITY AND OF KNOWLEDGE OF THE TESTATOR

549. No departure from plain words to escape illegality.

The construction of the will is in the first place considered quite apart from the question of the legality of the provisions of the will¹. If the words of the will are plain, they may not be struck out², or taken in a sense different from that which they plainly bear³, for the purpose of escaping from the consequences of invalidity under some rule of law, or even because it appears that the testator may have misunderstood the legal effect of the various species of gifts, and may have used language the legal interpretation of which may not carry out the intentions he had in his mind⁴.

1 *Pearks v Moseley* (1880) 5 App Cas 714 at 719, HL, per Lord Selbourne. See also *Taylor v Frobisher* (1852) 5 De G & Sm 191 at 197; and PARA 516 text and note 1 ante.

2 *Heasman v Pearse* (1871) 7 Ch App 275 at 283; *Re Coyte, Coyte v Coyte* (1887) 56 LT 510 at 513.

3 *A-G v Williams* (1794) 2 Cox Eq Cas 387 at 388; *Thellusson v Woodford* (1799) 4 Ves 227 at 329; *Mainwaring v Beavor* (1849) 8 Hare 44 at 48; *Speakman v Speakman* (1850) 8 Hare 180 at 186; *Tatham v Drummond* (1864) 4 De GJ & Sm 484 at 486; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693.

4 *Higgins v Dawson* [1902] AC 1 at 11, HL, per Lord Davey. See also *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 159; *Nunn v Hancock* (1868) 16 WR 818 at 819. As to the circumstances in which there is for probate purposes a presumption in favour of knowledge and approval by the testator of the contents of his will see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 317.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/B. PRESUMPTIONS OF LEGALITY AND OF KNOWLEDGE OF THE TESTATOR/550. Presumption in ambiguous cases.

550. Presumption in ambiguous cases.

Where the wording of the will is ambiguous, and appears according to one construction to offend against some rule of law and to be partially invalid, but is fairly capable of another construction which avoids the objection, the latter is presumed to be the testator's intention¹. The court has an inclination to believe, if reasonably possible, that the testator did not intend to transgress the law². In the case of the will of a testator dying on or after 1 January 1983 which is ambiguous on its face, extrinsic evidence, including evidence of intention, may be admitted to assist in its interpretation³.

1 *Martelli v Holloway* (1872) LR 5 HL 532 at 548; *Pearks v Moseley* (1880) 5 App Cas 714 at 719; *Von Brockdorff v Malcolm* (1885) 30 ChD 172 at 179; *Re Pounder, Williams v Pounder* (1886) 56 LJ Ch 113 at 114; *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939 at 943; *Re Mortimer, Gray v Gray* [1905] 2 Ch 502 at 506, CA; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 365, CA. It is open to question whether in these circumstances, in relation to the will of a testator who died on or after 1 January 1983, the court will receive evidence of his actual intention to the contrary: see PARAS 483, 506-507 ante.

2 *Leach v Leach* (1843) 2 Y & C Ch Cas 495 at 499 per Knight Bruce V-C.

3 See the Administration of Justice Act 1982 s 21(1)(b), (2); and PARAS 483, 507-508 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/C. PRESUMPTION FAVOURING RELATIVES OR PERSONS HAVING A CLAIM ON THE TESTATOR/551. Presumptions in favour of children.

C. PRESUMPTION FAVOURING RELATIVES OR PERSONS HAVING A CLAIM ON THE TESTATOR

551. Presumptions in favour of children.

There is no presumption, in the case of a will¹, that the testator's children are intended to be provided for or to have equal benefits². In the construction of a will the only guide is the testator's language, and there is no supposition that any person is intended to take except those who are described as takers³.

If, however, the language in a will expressly providing for the testator's family is ambiguous⁴, then, in the absence of direct evidence of his intention⁵, the court, so far as it can, prefers that construction which will most benefit the testator's family generally, on the ground that this must more nearly correspond with his intention⁶. In such cases, the court construes the will so as to include as many children as possible⁷, and to vest their interests on attaining majority, and so as not to make the interests of children who attain majority dependent on surviving their parents⁸.

1 As to presumptions in the case of marriage articles see SETTLEMENTS vol 42 (Reissue) PARAS 631-635.

2 *Re Crosse's Will* (1863) 9 Jur NS 429 at 430. See also *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 93; *Re Jodrell, Jodrell v Seale* (1890) 44 ChD 590 at 605, CA (affd sub nom *Seale-Hayne v Jodrell* [1891] AC 304, HL). However, as to the court's power to order provision to be made for children from the estate of the deceased see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 667 et seq.

3 *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 at 93 per Lord Cranworth. See also *Tucker v Harris* (1832) 5 Sim 538 at 543.

4 *Bright v Rowe* (1834) 3 My & K 316 at 322.

5 As to the circumstances in which extrinsic evidence is admissible see PARAS 483, 506-507 ante.

6 *Farrant v Nichols* (1846) 9 Beav 327 at 330; *Bythesea v Bythesea* (1854) 23 LJ Ch 1004 at 1006; *Re Hamlet, Stephen v Cunningham* (1888) 39 ChD 426 at 433-434, CA.

7 *Bouverie v Bouverie* (1847) 2 Ph 349 at 351; *Lee v Lee* (1860) 1 Drew & Sm 85 at 87; *White v Hill* (1867) LR 4 Eq 265 at 271; *Williams v Haythorne, Williams v Williams* (1871) 6 Ch App 782 at 785.

8 This presumption is specially applicable to gifts of portions in a settlement (*Emperor v Rolfe* (1748-9) 1 Ves Sen 208; *Howgrave v Cartier* (1814) 3 Ves & B 79 at 91; and see SETTLEMENTS vol 42 (Reissue) PARA 738), but it applies also to wills (*Hallifax v Wilson* (1809) 16 Ves 168 at 172; *Jackson v Dover* (1864) 2 Hem & M 209 at 215; *Re Knowles, Nottage v Buxton* (1882) 21 ChD 806; *Re Hamlet, Stephen v Cunningham* (1888) 39 ChD 426 at 433, CA; *Re Roberts, Percival v Roberts* [1903] 2 Ch 200 at 204 per Joyce J ('in case of ambiguity or doubt that construction is to be favoured which will allow of a child who takes a vested interest making such provision as is usual for his family'); *Duffield v M'Master* [1906] 1 IR 333, Ir CA). The different character of a will is a circumstance to be weighed in applying the rule: *Farrer v Barker* (1852) 9 Hare 737 at 744; *Tucker v Harris* (1832) 5 Sim 538 at 543. It is not clear whether the rule applies to grandchildren, or other persons to whom the testator is not in loco parentis: see *Re Hamlet, Stephen v Cunningham* (1888) 38 ChD 183 at 190; on appeal 39 ChD 426 at 433-434, CA (where Cotton LJ, differing from the view expressed in the court below, thought that the rule would apply to such persons). See also *Farrer v Barker* (1852) 9 Hare 737 at 744.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/C. PRESUMPTION FAVOURING RELATIVES OR PERSONS HAVING A CLAIM ON THE TESTATOR/552. Presumptions in favour of other persons.

552. Presumptions in favour of other persons.

Where the words of the will are ambiguous, then, in the absence of direct evidence of the testator's intention¹, the court may sometimes be assisted by the presumptions that, in the absence of special circumstances, relatives of equal degree are of equal importance to a testator as recipients of his bounty², and that, as a rule, a testator does not pass over a near relative for the purpose of benefiting more remote relatives, or over any relative or other person having a claim on him³, or with whom he was intimate⁴, for the purpose of benefiting relatives having no claim or strangers. The latter presumption, however, gives no assistance to the court in a contest between persons related in equal degree to the testator⁵, nor are any of these presumptions applicable unless their application accords with the actual words of the will⁶.

1 As to the circumstances in which extrinsic evidence is admissible see PARAS 483, 506-507 ante.

2 *Hewet v Ireland* (1718) 1 P Wms 426; *Jenkins v Hughes* (1860) 8 HL Cas 571 at 590; *Swift v Swift* (1863) 32 LJ Ch 479 at 480; *Heasman v Pearse* (1871) 7 Ch App 275 at 284; *Selby v Whittaker* (1877) 6 ChD 239 at 249, CA, per James LJ; *Re Prosser, Prosser v Griffith* [1929] WN 85.

3 See *Re Gregory's Settlement and Will* (1865) 34 Beav 600 at 602 (where the testator's godson was preferred to his brother, the description applying partly to both). However, it is doubtful whether this decision would now be followed.

4 *Careless v Careless* (1816) 1 Mer 384 at 389. Evidence of the testator's degrees of intimacy with the various claimants is admitted for the purpose of applying this presumption: see PARA 502 ante.

5 *Re Price, Price v Newton* [1905] 2 Ch 55 at 58.

6 *Beaudry v Barbeau* [1900] AC 569 at 575, PC.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iii) Presumptions/C. PRESUMPTION FAVOURING RELATIVES OR PERSONS HAVING A CLAIM ON THE TESTATOR/553. Presumption in favour of heir or next of kin.

553. Presumption in favour of heir or next of kin.

Formerly¹, in order to avoid holding the will void for uncertainty², the court favoured the heir³ or head of a family in order of inheritance where the words of the will were ambiguous⁴. It is doubtful whether any similar rule now exists in favour of the first person entitled on intestacy⁵. That person takes, if at all, not under any presumed intention of the testator, but for want of any clear indication that someone else is to take⁶.

1 This appears at one time to have been a principle of public policy at common law: see *Wild's Case* (1599) 6 Co Rep 16b at 17a; 2 Pollock and Maitland's History of English Law (2nd Edn) p 328.

2 As to uncertainty see PARAS 554-558 post.

3 Although descent to the heir was abolished by the Administration of Estates Act 1925 s 45(1) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 584; REAL PROPERTY vol 39(2) (Reissue) PARAS 157, 254), equitable entailed interests in real estate could still be created by reference to the heir up to and including 31 December 1996, and it remains possible to confer other equitable interests on the heir of a deceased person under the Law of Property Act 1925 s 132: see PARA 628 note 1 post.

4 The heir, or head of a family in order of inheritance, has been held to take under limitations to the 'nearest' or 'nearest and most deserving' of that family: see *Thellusson v Lord Rendlesham* (1859) 7 HL Cas 429 at 512; *Power v Quealy* (1878) 2 LR Ir 227 (affd 4 LR Ir 20, Ir CA). See also *Doe d Winter v Perratt* (1843) 9 Cl & Fin 606, HL; *Chapman's Case* (1574) 3 Dyer 333b. The context of the will may show that the testator did not intend the order of inheritance to be observed: *Thomason v Moses* (1842) 5 Beav 77; and see *Fulford v Hardy* [1909] AC 570 at 574, PC ('If the language of the will is plain, it must be given effect to, and cannot be made to bend to a supposed predilection in favour of male offspring').

5 As to the persons entitled on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq; and as to the admissibility of direct evidence of the testator's intention in cases of ambiguity see PARAS 483, 506-507 ante.

6 *Mills v Farmer* (1815) 19 Ves 483 at 484. See also PARA 548 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iv) Uncertainty/554. Circumstances in which a gift is held void for uncertainty.

(iv) Uncertainty

554. Circumstances in which a gift is held void for uncertainty.

The absurd or irrational nature of a disposition clearly expressed, or the difficulties in interpreting a disposition ambiguously expressed, are not enough to render the disposition void for uncertainty; to be void for this reason, it must be utterly impossible to put a meaning on it¹.

The court has always been reluctant to hold a gift void for uncertainty, and has always adopted the benevolent rule that, if there is ever so little reason in favour of one construction of an ambiguous gift more than another, the adoption of the construction favoured is at least nearer the testator's intention than that the whole disposition should be void and the persons entitled on an intestacy let in². In such cases extrinsic evidence has always been admitted to elucidate the testator's meaning³, and, in so far as any part of the will of a testator who died on or after 1 January 1983 is meaningless, such extrinsic evidence may include evidence of the testator's intention⁴.

1 *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520 at 529, CA. See also *Mason v Robinson* (1825) 2 Sim & St 295 at 298; *Doe d Winter v Perratt* (1843) 6 Man & G 314 at 361-362, HL; *Anthony v Donges* [1998] 2 FLR 775, [1998] Fam Law 666 (gift to testator's wife of 'such minimal part of my estate as she may be entitled to under English law for maintenance purposes').

2 *Doe d Winter v Perratt* (1843) 6 Man & G 314 at 359, HL, per Lord Brougham. See also *Oddie v Woodford* (1821) 3 My & Cr 584 (followed in *Doe d Angell v Angell* (1846) 9 QB 328 at 354); *Bristow v Bristow* (1842) 5 Beav 289 at 292; *Stephens v Powys* (1857) 1 De G & J 24.

3 As to the avoidance of uncertainty see PARA 555 post.

4 See the Administration of Justice Act 1982 s 21(1)(a), (2); and PARA 483 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iv) Uncertainty/555. Avoidance of uncertainty.

555. Avoidance of uncertainty.

Uncertainty may be avoided by the proper admission of extrinsic evidence¹, which in certain circumstances may include evidence of the testator's intention², but, if such evidence is insufficient to resolve the ambiguity³, the gift fails for uncertainty⁴.

Uncertainty may also be avoided by reference to the context, or by application of the maxim *id certum est quod certum reddi potest*⁵. Thus indefinite words added to a gift do not render it uncertain if the gift is substantially ascertained from the nature of the case⁶, and no objection can arise where, although the amount of the gift is indefinite, it is stated to be for a particular purpose and the court can by inquiry ascertain what is the sum sufficient or necessary to answer that purpose⁷. Further, a testator may validly appoint persons to select the objects of his bounty, provided that the objects are individual persons or corporations⁸, but no delegation of the testamentary power is permitted where the gift is for purposes to be selected⁹, unless the purposes from which the selection is to be made are confined to charitable purposes¹⁰. If the extent of the testator's bounty is to be measured by a formula, he may leave it to his executors to determine the precise amount, even though without that determination there would be no certainty¹¹.

1 As to the admission of extrinsic evidence see PARA 481 et seq ante. As to the circumstances in which a gift is held void for uncertainty see PARA 554 ante.

2 As to the circumstances in which extrinsic evidence of intention is admissible see PARAS 483, 506-507 ante.

3 *Richardson v Watson* (1833) 4 B & Ad 787; *Blundell v Gladstone* (1844) 14 Sim 83; *Asten v Asten* [1894] 3 Ch 260.

4 *Thomas d Evans v Thomas* (1796) 6 Term Rep 671; *Drake v Drake* (1860) 8 HL Cas 172; *Re Stephenson, Donaldson v Bamler* [1897] 1 Ch 75.

5 le that which is capable of being made certain ought to be treated as certain: see eg *Adams v Jones* (1852) 9 Hare 485 at 486. A blank in a description does not make a gift uncertain if certainty is given by the context and circumstances admissible in evidence: *Price v Page* (1799) 4 Ves 680; *Phillips v Barker* (1853) 1 Sm & G 583; *Re Harrison, Turner v Hellard* (1885) 30 ChD 390, CA; *Re Wyatt, Furniss v Phear* (1888) 36 WR 521.

6 *Oddie v Brown* (1859) 4 De G & J 179 at 186, 194 ('or thereabouts'), explaining *Curtis v Lukin* (1842) 5 Beav 147 (until leases 'nearly' expired). See also *Re Hunter's Settlement Trust, Elliott v Hunter* (1939) 83 Sol Jo 339.

7 *Dundee Magistrates v Morris* (1858) 3 Macq 134, HL. See also *Broad v Bevan* (1823) 1 Russ 511n (considered in *Abraham v Alman* (1826) 1 Russ 509 at 516); *Jackson v Hamilton* (1846) 3 Jo & Lat 702 at 709 (sufficient to remunerate executors for their trouble); *Edwardes v Jones (No 2)* (1866) 35 Beav 474; *Re Mills, Midland Bank Executor and Trustees Co Ltd v United Birmingham Hospitals Board of Governors* [1953] 1 All ER 835, [1953] 1 WLR 554 ('such sum as shall be necessary to endow a bed'); *Re Golay, Morris v Bridgewater* [1965] 2 All ER 660, [1965] 1 WLR 969 (bequest of 'reasonable income' valid).

8 *Re Smith, Johnson v Bright-Smith* [1914] 1 Ch 937 at 948 per Joyce J. The conferment of a general or intermediate power is not invalid as a delegation of the testamentary power: *Re Beatty's Will Trusts, Hinves v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503. See also PARA 303 ante.

9 See eg *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL. See also PARA 309 ante. As to the exclusiveness of gifts for charitable purposes see CHARITIES vol 8 (2010) PARA 92; and as to the validation by statute of certain instruments taking effect before 16 December 1952 and providing for property to be held for objects partly but not exclusively charitable see CHARITIES vol 8 (2010) PARAS 97-102. As to the extent to which equity will recognise a trust which is not for the benefit of ascertained or ascertainable beneficiaries generally see *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA; *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; and TRUSTS vol 48 (2007 Reissue) PARA 607.

10 As to the meaning of 'charitable purposes' see CHARITIES vol 8 (2010) PARA 1 et seq. As to the meaning of delegation of power to determine objects CHARITIES vol 8 (2010) PARA 123 et seq.

11 *Re Conn, Conn v Burns* [1898] 1 IR 337 (where portions were to be determined by the wife and executors according to the value of the services the daughters might have rendered the family, and, in the case of marriage portions, according to the match made).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iv) Uncertainty/556. Gifts stated in the alternative.

556. Gifts stated in the alternative.

Where the amount of a gift¹ is stated in the alternative, the gift may be construed, according to the construction most favourable to the donee², as a gift of the larger amount³, and a direction to apply a sum not exceeding a stated amount for a particular purpose may be similarly construed as a gift of the stated amount, after any discretion applying to the gift is spent⁴.

1 As to alternative donees see PARA 611 et seq post.

2 See PARA 653 post.

3 *Seale v Seale* (1715) 1 P Wms 290.

4 *Thompson v Thompson* (1844) 1 Coll 381 at 395, 397 (following *Cope v Wilmot* (1772) 1 Coll 396n); *Gough v Bult* (1848) 16 Sim 45.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iv) Uncertainty/557. Gift to one of a set of persons.

557. Gift to one of a set of persons.

Where the donee is defined as one of a set of persons satisfying some description (as in the case of a gift to one of the sons of a named person), and there are in existence several persons in the set, the gift is void for uncertainty unless there is sufficient evidence¹ to show what was the testator's intention². Where, however, at the date of the will there are no persons in existence who are members of the set or who satisfy the description, the gift may admit of being construed to mean the person who first becomes a member of the set or satisfies the description³.

1 As to the circumstances in which extrinsic evidence of intention is admissible see PARAS 483, 506-507 ante.

2 *Dowset v Sweet* (1753) Amb 175, explained in *Del Mare v Robello* (1792) 1 Ves 412 at 415. See also *Hampshire v Peirce* (1751) 2 Ves Sen 216. As to class gifts generally see PARA 593 et seq post.

3 *Bate v Amherst* (1663) T Raym 82; *Blackburn v Stables* (1814) 2 Ves & B 367; *Powell v Davies* (1839) 1 Beav 532; *Ashburner v Wilson* (1850) 17 Sim 204. As to this rule in construing descriptions see PARA 591 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(iv) Uncertainty/558. Examples of gifts void for uncertainty.

558. Examples of gifts void for uncertainty.

Gifts void for uncertainty include:

- 58 (1) gifts which are wanting in particularity of expression, as to the subject¹ or object² of the gift, where no person is nominated by the testator or other means provided for giving particularity, or such means fail³, and no rule of construction sufficiently assists the court⁴;
- 59 (2) gifts which depend on an infinite number of persons or things⁵;
- 60 (3) gifts which may have two or more alternative meanings, where there is nothing in the context or the admissible evidence⁶, or any rule of construction⁷, to enable the court to resolve the ambiguity⁸;
- 61 (4) gifts which are to be applied in perpetuity for purposes which cannot be construed as necessarily charitable⁹, and include, without the possibility of severance, purposes¹⁰ for which a perpetual gift is not allowed¹¹.

1 *Peck v Halsey* (1726) 2 P Wms 387 ('some of my best linen'); *Jubber v Jubber* (1839) 9 Sim 503 ('a handsome gratuity'). See also *Re Campsill, Reading v Hinde* (1910) 128 LT Jo 548 (where the testamentary document consisted of a list of names with sums of money); *Jones d Henry v Hancock* (1816) 4 Dow 145, HL; *White v White* (1908) 28 NZLR 129 ('a small portion of what is left'); *Anthony v Donges* [1998] 2 FLR 775, [1998] Fam Law 666 (gift to testator's wife of 'such minimal part of my estate as she may entitled to under English law for maintenance purposes'). The word 'all', used as a noun, is regarded as not uncertain: *Re Shepherd, Mitchell v Loram* (1914) 58 Sol Jo 304 (not following *Bowman v Milbanke* (1664) 1 Lev 130).

2 For cases of uncertainty in relation to donees see PARA 347 ante.

3 *Boyce v Boyce* (1849) 16 Sim 476 (devise to be ascertained by a person who was dead). See also *Jerningham v Herbert* (1828) 4 Russ 388 (devise to be ascertained by future act of testatrix made impossible by her mental disorder).

4 In *Re Bassett's Estate, Perkins v Fladgate* (1872) LR 14 Eq 54 at 57 (followed in *Re Byrne, Byrne v Byrne* (1898) 24 VLR 832), the presumption against intestacy supplied the omission of any description of subject matter. See also PARA 547 note 4 ante. In *Mohun v Mohun* (1818) 1 Swan 201, a similar omission made the gift void.

5 *Re Moore, Prior v Moore* [1901] 1 Ch 936 ('all the persons living at my death'). A gift depending for duration on the death of the last survivor of all the lineal descendants of Queen Victoria who should be living at the testator's death was not void for uncertainty, at least in the case of a testator dying in 1926: *Re Villar, Public Trustee v Villar* [1929] 1 Ch 243, CA; *Re Leverhulme, Cooper v Leverhulme (No 2)* [1943] 2 All ER 274; and see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1014.

6 As to the admissibility of evidence in such cases, whether for identification or otherwise see PARA 481 et seq ante; and as to the admissibility of extrinsic evidence of intention in cases of ambiguity see PARAS 506-507 ante.

7 See PARA 508 text and notes 7-9 ante.

8 Eg where the subject matter is one of a number of things and the testator does not give the choice to the donee (*Asten v Asten* [1894] 3 Ch 260, commenting on *Richardson v Watson* (1833) 4 B & Ad 787); but such a gift may be valid where the property from which the gift is to be made is a homogeneous mass, such as a bank account or a holding of shares (*Hunter v Moss* [1993] 1 WLR 934 (affd [1994] 3 All ER 215, [1994] 1 WLR 452, CA), referring to *Re Cheadle, Bishop v Holt* [1900] 2 Ch 620, CA, and *Re Clifford, Mallam v McFie* [1912] 1 Ch 29). For examples see PARA 418 note 4 ante. Where a primary gift payable out of the income of a fund fails, and the extent of the gift is not sufficiently defined, a gift of the balance of the income fails for uncertainty: *Re Porter, Porter v Porter* [1925] Ch 746.

9 For the meaning of 'charitable' see CHARITIES vol 8 (2010) PARA 1 et seq.

10 Eg 'public' or 'benevolent' purposes: see CHARITIES vol 8 (2010) PARA 46.

11 See eg *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL. See also CHARITIES vol 8 (2010) PARAS 4, 46; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005; TRUSTS vol 48 (2007 Reissue) PARA 607. As to the validation by statute of certain instruments taking effect before 16 December 1952 and providing for property to be held for objects partly but not exclusively charitable see CHARITIES vol 8 (2010) PARAS 97-102.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/559. Effect where description is accurate.

(v) Misdescription of Property or Persons

559. Effect where description is accurate.

If all the terms of description fit some particular property¹, that property and nothing more passes; the description will not be enlarged so as to include anything which some of those terms do not accurately fit², nor will it be restricted so as not to include some part of the property accurately described³. Where a description is certain, additional words do not affect it, but, where the first description is uncertain, additional words may remove the uncertainty⁴. The accurate use in a will of the name of an individual or society creates a strong presumption that the person so described is the donee intended by the testator, although it may not exclude further inquiry as to the person intended⁵.

1 *Re Seal, Seal v Taylor* [1894] 1 Ch 316, CA.

2 *Webber v Stanley* (1864) 16 CBNS 698 (dissenting from *Stanley v Stanley* (1862) 2 John & H 491); *Hardwick v Hardwick* (1873) LR 16 Eq 168 at 175; *Whitfield v Langdale* (1875) 1 ChD 61 at 74; *Re Seal, Seal v Taylor* [1894] 1 Ch 316 at 323, CA. See also *Doe d Brown v Brown* (1809) 11 East 441; *Doe d Browne v Greening* (1814) 3 M & S 171; *Doe d Tyrrell v Lyford* (1816) 4 M & S 550; *Okeden v Clifden* (1826) 2 Russ 309; *Miller v Travers* (1832) 8 Bing 244; *Doe d Hubbard v Hubbard* (1850) 15 QB 227 at 245; *Slingsby v Grainger* (1859) 7 HL Cas 273; *Homer v Homer* (1878) 8 ChD 758, CA; *Corballis v Corballis* (1882) 9 LR Ir 309.

3 *Down v Down* (1817) 1 Moore CP 80; *Pullin v Pullin* (1825) 10 Moore CP 464; *Doe d Templeman v Martin* (1833) 4 B & Ad 771.

4 See *Doe d Harris v Greathed* (1806) 8 East 91 at 103-104.

5 *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207, HL. Cf *Re Meyers, London Life Association v St George's Hospital* [1951] Ch 534, [1951] 1 All ER 538; *Re Satterthwaite's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Royal Veterinary College* [1966] 1 All ER 919, [1966] 1 WLR 277, CA. As to the evidence admissible where the gift is plain and unambiguous see PARA 498 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/560. Effect where description is inaccurate.

560. Effect where description is inaccurate.

If, when examined, the words of description do not fit any subject with accuracy, and if there must be some modification of them¹ in order to place a sensible construction on the will, then the whole must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and generally how the subject, whether the property or the donee, intended by the testator can be identified². For this purpose, extrinsic evidence has always been received³, and this may include evidence of the testator's intention in certain circumstances⁴. In such cases the words are presumed to be a misdescription of a subject existing and with regard to which the will may validly operate⁵. Where, however, the context shows that the testator was not merely misdescribing an actually existing subject, but was under an erroneous impression that the subject actually did exist as described, or that he could dispose of it, the gift may fail⁶.

1 As to modifying the words of the will see PARAS 477, 544-545 ante.

2 See eg *Doe d Humphreys v Roberts* (1822) 5 B & Ad 407; *Re Ofner, Samuel v Ofner* [1909] 1 Ch 60, CA.

3 *Hardwick v Hardwick* (1873) LR 16 Eq 168; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314 at 317. See also PARA 497 et seq ante.

4 As to when evidence of the testator's intention is admissible see PARAS 483, 506-507 ante.

5 The presumption is that a designation in general words of the property intended to be affected by a will refers prima facie to that property only on which the will is capable of operating (*Maxwell v Maxwell* (1852) 2 De GM & G 705 at 715 (approving *Wentworth v Cox* (1822) 6 Madd 363 at 364); *Baring v Ashburton* (1886) 54 LT 463), and that the testator intended to dispose only of his own property (see EQUITY vol 16(2) (Reissue) PARA 730).

6 Eg where the context shows that the testator erroneously believed that he had such property as described, or where he had only the intention of acquiring it (*Evans v Tripp* (1821) 6 Madd 91; *Waters v Wood* (1852) 5 De G & Sm 717; *Millar v Woodside* (1872) IR 6 Eq 546; and see *Re Mulder, Westminster Bank Ltd v Mulder* [1943] 2 All ER 150, CA (testator entitled to a share in a business but purporting to dispose of whole)), or where the testator described persons who he merely imagined were in existence, and who did not exist (*Del Mare v Robello* (1792) 1 Ves 412; *Daubeney v Coghlan* (1842) 12 Sim 507).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/561. Falsa demonstratio non nocet.

561. Falsa demonstratio non nocet.

It is a rule of construction, which applies to all written instruments and not to wills alone¹, that, if, of various terms used to describe a subject matter (whether a person or property), some are sufficient to ascertain the subject matter with certainty but others add a description which is not true, these other terms are not allowed to vitiate the gift². The rule in full is 'falsa demonstratio non nocet cum de corpore constat'³, and the second part of this maxim is an essential part of it⁴. The false description must merely be added onto that which is otherwise clear⁵, although it need not come at the end of the sentence⁶. The characteristic of cases within the rule is that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only⁷.

1 As to this rule in the case of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 227-232.

2 *Llewellyn v Earl of Jersey* (1843) 11 M & W 183 at 189 per Parke B (deed); *Morrell v Fisher* (1849) 4 Exch 591 at 604 per Alderson B. See also *Goodright d Lamb v Pears* (1809) 11 East 58; *Anderson v Berkley* [1902] 1 Ch 936 at 940.

3 'If a false description does not vitiate when there is no doubt as to the subject meant. See *Travers v Blundell* (1877) 6 ChD 436 at 442, 444, CA. Other versions are 'nil facit error nominis cum de corpore vel persona constat' (*Re Brocket, Dawes v Miller* [1908] 1 Ch 185 at 194), and 'praesentia corporis tollit errorem nominis' (Bacon's Maxims, reg 25).

4 *Re Brocket, Dawes v Miller* [1908] 1 Ch 185 at 194.

5 *Thomas d Evans v Thomas* (1796) 6 Term Rep 671 at 676 per Lord Kenyon CJ.

6 *Cowen v Truefitt Ltd* [1899] 2 Ch 309 at 311, CA (lease).

7 *Morrell v Fisher* (1849) 4 Exch 591 at 604; *Re Rayer, Rayer v Rayer* [1903] 1 Ch 685.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/562. Description wholly false.

562. Description wholly false.

Where the description is wholly false, so that no known existing person or thing satisfies the description, but the context of the will and the circumstances of the case¹ show unambiguously whom or what the testator meant, the description is rejected and the testator's intention is given effect².

This rule has been applied to false descriptions of donees in cases where one or more of the legatee's names was wrongly given³; where a corporation was misdescribed⁴; where the legatee was described as 'rector' instead of 'vicar'⁵, or as 'apothecary' instead of 'dispenser'⁶; and where the name of the father⁷ or mother⁸ of the legatees was wrongly given. In a number of cases a gift to the children of one person has taken effect in favour of the children of another person where the context and circumstances show that they were the persons intended⁹.

The rule has most often been applied to false descriptions of property, where no property accurately answering the description given belonged to the testator at the date of the will¹⁰. In such circumstances 'my money on deposit receipt' in a named bank has passed shares in the bank¹¹; 'shares' has passed debenture stock¹²; 'sums owing' has passed sums due under documents which were unenforceable for want of registration¹³; 'real estate' has passed the proceeds of sale of real estate¹⁴; 'war loans' has passed Exchequer bonds¹⁵, conversion stock and Treasury bonds¹⁶; 'stocks or shares in the Great Eastern Railway' was held to pass stock substituted on the amalgamation of that company with other companies¹⁷; a gift of the credit balance in an identified bank deposit account which was paid during the lifetime of the testatrix into a new account which yielded a higher rate of interest but was otherwise on very similar terms has been held to carry the money in the new account¹⁸; and a gift of property described as 'Lithbridge' has passed a property in fact called 'Silkbridge'¹⁹. The principle is limited to cases of misdescription of property in the testator's possession at the date of the will; there is no ground for assuming that he was falsely describing property he did not then possess and perhaps did not contemplate possessing²⁰.

1 As to the reception of evidence in such cases see PARA 497 et seq ante.

2 See *Re Milner-Gibson-Cullum, Cust v A-G* [1924] 1 Ch 456 (where a portrait was said to be wrongly described, but there was no difficulty in identifying the picture intended to pass).

3 *Masters v Masters* (1718) 1 P Wms 421 at 425 (Mrs Swopper described as 'Mrs Sawyer'); *Beaumont v Fell* (1723) 2 P Wms 141 (Gertrude Yardley described as 'Catherine Earnley', there being no such person); *Lee v Pain* (1844) 4 Hare 201 at 253 (Miss F A J described as 'Miss S J', there being a Mrs S J but it being clear that the gift was for an unmarried woman).

4 *A-G v Rye Corp* (1817) 7 Taunt 546; *Queen's College, Oxford v Sutton* (1842) 12 Sim 521. As to misdescription of charities see CHARITIES vol 8 (2010) PARA 108.

5 *Hopkinson v Ellis* (1842) 5 Beav 34.

6 *Ellis v Bartrum (No 2)* (1857) 25 Beav 109.

7 *Douglas v Fellows* (1853) Kay 114.

8 *Bradwin v Harpur* (1759) Amb 374.

9 *Bradwin v Harpur* (1759) Amb 374; *Douglas v Fellows* (1853) Kay 114; *Re Waller, White v Scoles* (1899) 68 LJ Ch 526, CA (where the father was stated to be dead at the date of the will, the person named was still alive and unmarried, but another, of the same family but with different forenames, was dead leaving three children). See also *Bristow v Bristow* (1842) 5 Beav 289 at 291 (where the donees were the three remaining children of a named uncle, who had no children, but a cousin of the same name had three children answering the description); *Lord Camoys v Blundell* (1848) 1 HL Cas 778 (where a gift to the second son of E W was construed as a gift to the second son of J W, E W being his eldest son).

10 The rule cannot be applied if the testator had property at the date of the will which accurately answered the description: *Re Weeding, Armstrong v Wilkin* [1896] 2 Ch 364; *Re Lamb, Marston v Chauvet* (1933) 49 TLR 541.

11 *Re Cranfield, Mosse v Cranfield* [1895] 1 IR 80. See also *Re Vear, Vear v Vear* (1917) 62 Sol Jo 159.

12 *Re Weeding, Armstrong v Wilkin* [1896] 2 Ch 364.

13 *Re Rowe, Pike v Hamlyn* [1898] 1 Ch 153, CA.

14 *Re Glassington, Glassington v Follett* [1906] 2 Ch 305, not followed in *Re Lewis's Will Trusts, Lewis v Williams* [1984] 3 All ER 930, [1985] 1 WLR 102 (where a gift of 'my freehold farm' was held not to carry the testator's holding of three-quarters of the issued shares in a family farming company which owned a farm and other assets).

15 *Re Ionides, London County Westminster and Parr's Bank Ltd v Craies* (1922) 38 TLR 269.

16 *Re Price, Trumper v Price* [1932] 2 Ch 54; *Re Gifford, Gifford v Seaman* [1944] Ch 186, [1944] 1 All ER 268.

17 *Re Anderson, Public Trustee v Bielby* (1928) 44 TLR 295 (where stock in the company formed on the amalgamation, which the testator had purchased before the date of the will but after the amalgamation, did not, however, pass). In this case the Act which brought about the amalgamation contained provision for the adaptation of references to stock in wills etc: see PARA 446 text and note 12 ante.

18 *Re Dorman* [1994] 1 All ER 804, [1994] 1 WLR 282.

19 *Re Nicholl, Re Perkins, Nicholl v Perkins* (1920) 125 LT 62.

20 *Re Gifford, Gifford v Seaman* [1944] Ch 186 at 189, [1944] 1 All ER 268 at 269 (where a gift of 'war bonds' was held to pass consolidated stock, but not national savings certificates and defence bonds acquired after the date of the will).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/563. Limits of the rule.

563. Limits of the rule.

The rule of 'falsa demonstratio non nocet'¹ is limited by a second rule of no less importance, namely that additional words are not rejected as a false description if they are capable of being read as accurate words of restriction². If, therefore, it is doubtful whether the words of the will import a false reference or description, or whether they are words of restriction which limit the generality of former words, the court never presumes error or falsehood, and the latter construction is preferred³. Accordingly, where there exists some subject as to which all the descriptions are true, and some subject as to which part is true and part false, the words are considered to be words of true restriction, so that they refer to that subject only as to which all the descriptions are true⁴.

Additional words have been construed as words of true restriction where they consisted of references to tenure⁵, occupation⁶, locality⁷, mode of acquisition or title⁸, or of descriptions of donees⁹.

In order for the words to be so construed, all the words must be wholly true as to the restricted part, and there must be no clear intention that the whole should pass¹⁰.

1 As to this rule see PARA 561 ante.

2 Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram: Bacon's Maxims reg 13.

3 *Morrell v Fisher* (1849) 4 Exch 591 at 604 per Alderson B. See also *Doe d Ashforth v Bower* (1832) 3 B & Ad 453 at 459; *Nightingall v Smith* (1848) 1 Exch 879 at 886; *Re Bocket, Dawes v Miller* [1908] 1 Ch 185 at 190.

4 *Ridge v Newton* (1842) 2 Dr & War 239; *Morrell v Fisher* (1849) 4 Exch 591; *Slingsby v Grainger* (1859) 7 HL Cas 273 at 283, 287; *Gilliat v Gilliat* (1860) 28 Beav 481; *Pedley v Dodds, Dodds v Pedley* (1866) LR 2 Eq 819; *O'Connor v O'Connor* (1870) IR 4 Eq 483; *Millar v Woodside* (1872) IR 6 Eq 546; *Re Bennett, ex p Kirk* (1877) 5 ChD 800, CA.

5 *Roe d Conolly v Vernon and Vyse* (1804) 5 East 51; *Doe d Brown v Brown* (1809) 11 East 441; *Stone v Greening* (1843) 13 Sim 390; *Hall v Fisher* (1844) 1 Coll 47 (but, as to the last two cases cited see *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314; *Hallett v Hallett* (1898) 14 TLR 420, CA; and the cases cited in PARA 569 note 6 post); *Quennell v Turner* (1851) 13 Beav 240; *Mathews v Mathews* (1867) LR 4 Eq 278.

6 *Higham v Baker* (1583) Cro Eliz 15. See also *Doe d Parkin v Parkin* (1814) 5 Taunt 321; *Doe d Renow v Ashley* (1847) 10 QB 663; *Morrell v Fisher* (1849) 4 Exch 591; *Doe d Hubbard v Hubbard* (1850) 15 QB 227;

Whitfield v Langdale (1875) 1 ChD 61 at 80; *Homer v Homer* (1878) 8 ChD 758, CA; *Re Seal, Seal v Taylor* [1894] 1 Ch 316, CA.

7 *White v Vitty* (1826) 2 Russ 484; *Moser v Platt* (1844) 14 Sim 95; *Attwater v Attwater* (1853) 18 Beav 330; *Evans v Angell* (1858) 26 Beav 202; *Webber v Stanley* (1864) 16 CBNS 698; *Lambert v Overton* (1864) 11 LT 503; *Smith v Ridgway* (1866) LR 1 Exch 331, Ex Ch; *Keogh v Keogh* (1874) IR 8 Eq 179.

8 *Doe d Ryall v Bell* (1800) 8 Term Rep 579; *Roe d Conolly v Vernon and Vyse* (1804) 5 East 51; *Wilkinson v Bewicke* (1853) 3 De GM & G 937; *Cave v Harris, Harris v Cave* (1887) 57 LT 768. Cf *Norman v Norman* [1919] 1 Ch 297.

9 *Wrightson v Calvert* (1860) 1 John & H 250.

10 *Paul v Paul* (1760) 1 Wm Bl 255 at 256; *Hardwick v Hardwick* (1873) LR 16 Eq 168 at 176-177.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/564. Description partly true as to each of two or more subjects.

564. Description partly true as to each of two or more subjects.

If the description is not strictly applicable to any person or thing, but is applicable partly to one person or thing and partly to another, the court has always inquired into the material circumstances of the case for the purpose of deciding whether the testator intended to make the gift applicable to the one or the other¹, and may in certain circumstances receive evidence of the testator's intention².

1 *Bernasconi v Atkinson* (1853) 10 Hare 345 at 349. See also *Bradshaw v Bradshaw* (1836) 2 Y & C Ex 72; *Adams v Jones* (1852) 9 Hare 485; *Re Hooper, Hooper v Warner* (1902) 88 LT 160. For criticisms of this rule see *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 369. As to the names of donees see *British Home and Hospital for Incurables v Royal Hospital for Incurables* (1904) 90 LT 601, CA; and as to the subject matter of the gift see *Rowlatt v Easton* (1863) 2 New Rep 262 (where the court had to decide between two types of stock, neither of which exactly answered the description).

2 As to the admissibility of evidence of the testator's intention see PARAS 483, 506-507 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/565. General description followed by enumeration of particulars.

565. General description followed by enumeration of particulars.

Where some subject matter is given under a description applicable to the whole, and then words of enumeration are added which do not completely enumerate and exhaust all the particulars which are included under the previous description, the question is which is the predominant description¹. There is no rule that, of the two descriptions, the first is to prevail. If the subsequent words are meant to substitute a definite and precise statement for an antecedent generality, they must be read as explanatory and, if necessary, as restrictive of the prior general description²; otherwise the general description is given its full effect³.

1 *West v Lawday* (1865) 11 HL Cas 375 at 384; *Hardwick v Hardwick* (1873) LR 16 Eq 168; *Travers v Blundell* (1877) 6 ChD 436 at 441, 443, CA. See also *Blake v Blake* [1923] 1 IR 88.

2 *Re Brocket, Dawes v Miller* [1908] 1 Ch 185 at 195 per Joyce J (devise of 'all the real estate' to which the testatrix was entitled under a will, 'namely' certain parcels omitting one parcel; that parcel did not pass). Cf *D'Aglie v Fryer* (1841) 12 Sim 1; *Glanville v Glanville* (1863) 33 Beav 302.

3 *Matthews v Maude* (1830) 1 Russ & M 397; *Reeves v Baker* (1854) 18 Beav 372 ('all my property whether freehold or personal' passed copyholds); *Stanley v Stanley* (1862) 2 John & H 491; *West v Lawday* (1865) 11 HL Cas 375 at 384; *Re Roberts, Kiff v Roberts* (1886) 55 LT 498, CA ('all my property, leasehold and freehold' passed personalty); *Roberts v Thorp* (1911) 56 Sol Jo 13 ('all my property,' followed by a list of specific chattels, passed realty); *Stapleton v D'Alton* (1914) 49 ILT 62 (gift of remainder of estate consisting of certain described property); *Norman v Norman* [1919] 1 Ch 297; *Moore v Phelan* [1920] 1 IR 232 ('the seven houses I hold in' S Terrace passed the eight houses there to which the testatrix was entitled).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/566. Inaccuracy in number of donees.

566. Inaccuracy in number of donees.

Where there is a gift to a number of persons designated by a class or group description, with a statement of the number of the donees which is either greater or less¹ than the actual number of persons who fit the description at the death of the testator (as in the case of a gift to the four children of a named person, who at the death of the testator is shown to have five children), then, unless it appears that all the persons so designated were intended to take independently of their number², the court considers with how many of such persons the testator was acquainted at the date of his will, and, if the number corresponds with the number in the will, may thus be able to identify the particular persons described³. For this purpose, direct evidence of the testator's intention was formerly inadmissible⁴ but may now be admissible in construing the will of a testator who died on or after 1 January 1983⁵.

There are, however, cases where the court may arrive at the conclusion that all the persons satisfying a particular description are intended to be benefited, and, if there has been an inaccurate statement of the number of the persons composing the class, the court rejects the number⁶. Thus if it appears that at the date of the will the fact was, and the testator knew, that the number of persons who then answered the description was greater or less than the number shown by the will⁷, or if the number could not then, in fact and to the testator's knowledge, be ascertained⁸, or if (where the gift would otherwise be void for uncertainty) there is no evidence at all of the testator's knowledge or other admissible evidence to enable the court to determine who were meant by the description⁹, the court may reject the number as a mistake.

1 *Re Sharp, Maddison v Gill* [1908] 2 Ch 190, CA.

2 *Matthews v Foulshaw* (1864) 12 WR 1141.

3 *Sherer v Bishop* (1792) 4 Bro CC 55; *Lord Selsey v Lord Lake* (1839) 1 Beav 146 at 151 ('her five daughters'; there were five sons and one daughter, who alone took); *Lane v Green* (1851) 4 De G & Sm 239 (to the four sons of A; she had three sons and one daughter, who all took); *Newman v Piercy* (1876) 4 ChD 41; *Re Mayo, Chester v Keirl* [1901] 1 Ch 404 at 407. Another child, en ventre sa mère, and not known to the testator, may then be excluded: *Re Emery's Estate, Jones v Emery* (1876) 3 ChD 300; *Re Smiley* (1908) 28 NZLR 1; *Re McNeil, Wright v Johnstone* (1909) 9 SRNSW 220. For cases where the enumeration corrected a mistake in the names see *Garth v Meyrick* (1779) 1 Bro CC 30; *Humphreys v Humphreys* (1789) 2 Cox Eq Cas 184.

4 *Re Mayo, Chester v Keirl* [1901] 1 Ch 404.

5 See PARAS 483, 507 ante.

6 *Re Stephenson, Donaldson v Bamber* [1897] 1 Ch 75 at 81, CA, per Lord Russell of Killowen CJ, and at 85 per Lindley LJ; *Re Sharp, Maddison v Gill* [1908] 2 Ch 190 at 194, CA. See also *Harrison v Harrison* (1829) 1 Russ & M 71 at 72; *Hare v Cartridge* (1842) 13 Sim 165; *Lee v Pain* (1844) 4 Hare 201 at 249 (the last two cases cited

were commented on in *Re Stephenson, Donaldson v Bamber* supra); *Yeats v Yeats* (1852) 16 Beav 170 at 171; *Matthews v Foulshaw* (1864) 12 WR 1141; *Re Dutton, Plunkett v Simeon* [1893] WN 65; *Re Groom, Booty v Groom* [1897] 2 Ch 407; and see *Lord Selsey v Lord Lake* (1839) 1 Beav 146. The rule does not apply where the persons are described by name: see *Re Whiston, Whiston v Woolley* [1924] 1 Ch 122, CA.

7 *Hampshire v Peirce* (1751) 2 Ves Sen 216; *Scott v Fenoulhett* (1784) 1 Cox Eq Cas 79; *Daniell v Daniell* (1849) 3 De G & Sm 337; *Lee v Lee* (1864) 10 Jur NS 1041; *Spencer v Ward* (1870) LR 9 Eq 507.

8 *Sleech v Thorington* (1754) 2 Ves Sen 560 ('to the two servants living with me at my death').

9 *Tomkins v Tomkins* (1743) 19 Ves 126n; *Stebbing v Walkey* (1786) 2 Bro CC 85 at 86 (where, however, Kenyon MR said, 'I yield to the authority of the cases and not to the reason of them'); *Garvey v Hibbert* (1812) 19 Ves 125 (a leading case on this mode of construction); *Harrison v Harrison* (1829) 1 Russ & M 71 at 72; *Lee v Pain* (1844) 4 Hare 201 at 249; *Morrison v Martin* (1846) 5 Hare 507; *Wrightson v Calvert* (1860) 1 John & H 250 at 251 per Wood V-C (explained in *Newman v Piercey* (1876) 4 ChD 41 at 47 per Jessel MR); *Re Bassett's Estate, Perkins v Fladgate* (1872) LR 14 Eq 54; *McKechnie v Vaughan* (1873) LR 15 Eq 289; *Re Sharp, Maddison v Gill* [1908] 2 Ch 190, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/567. Designation by name or description.

567. Designation by name or description.

A donee has often been sufficiently designated by a nickname or erroneous name proved to have been used by the testator, or by a name gained by reputation and known to the testator¹, and property may be sufficiently described by the description the testator was accustomed to use².

1 *River's Case* (1737) 1 Atk 410 (illegitimate sons described as 'my sons'; but see now paras 643-644 post). See also *Gynes v Kemsley* (1677) Freem KB 293 ('Margery' described as 'Margaret'); *Baylis v A-G* (1741) 2 Atk 239; *Edge v Salisbury* (1749) Amb 70 at 71; *Goodinge v Goodinge* (1749) 1 Ves Sen 231; *Dowset v Sweet* (1753) Amb 175 ('James' described as 'John'); *Parsons v Parsons* (1791) 1 Ves 266; *Lee v Pain* (1844) 4 Hare 201 at 251-252; *Andrews v Andrews* (1885) 15 LR Ir 199, Ir CA.

2 Cf *Doe d Beach v Earl of Jersey* (1825) 3 B & C 870 ('my Briton Ferry estate'; estate not situated in Briton Ferry). See also the cases cited in PARA 503 note 7 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/568. Designation by both name and description.

568. Designation by both name and description.

Where a donee is designated by name and description, then, if there is a person who has that name and the description is incorrect for him and all others, the description is ignored, for it is a rule that a name will prevail against an error of description¹ unless the false description is due to the fraud of the alleged donee². The name alone, however, will not prevail unless it appears that the description is mistaken. For the rule to apply, it is necessary first to show that there is an error in the description³. Similarly, where a description is correct and sufficient, an incorrect name may be ignored⁴.

Where, however, either the name alone or the description alone is sufficient to identify a subject, and they do not identify the same subject, then, according to the circumstances of the case, the description and not the name⁵, or the name and not the description⁶, may prevail. The

name is in fact only a mode of description⁷, and the question is to determine which portion of the whole description is to prevail⁸. For this purpose, evidence is admissible of all the facts known to the testator at the date of the will, and in certain circumstances direct evidence of his intention may be received⁹. On the evidence properly admissible, a test often applied is to inquire whether the testator was more likely to err in the name or in the description¹⁰. Thus if there is a person for whom the name is accurate, but the testator was not intimate with him, and there is also a person for whom the name is inaccurate but the description is sufficient to identify him, and the testator was intimate with him, the latter is the person entitled¹¹.

If the question cannot be answered, the gift is void for uncertainty¹².

1 See Bacon's Maxims reg 25. See also *Giles v Giles, Penfold v Penfold* (1836) 1 Keen 685; *Doe d Gains v Rouse* (1848) 5 CB 422; *Ford v Batley* (1852) 23 LJ Ch 225; *Ormiston's Executors v Laws* 1966 SLT 110 (where a gift 'to my fiancée S M', who in fact had never been a fiancée, took effect).

2 *Giles v Giles, Penfold v Penfold* (1836) 1 Keen 685. See also *Kennell v Abbott* (1799) 4 Ves 802; *Wilkinson v Joughin* (1866) LR 2 Eq 319; *Re Posner, Posner v Miller* [1953] P 277, [1953] 1 All ER 1123.

3 See *Drake v Drake* (1860) 8 HL Cas 172 at 179 per Lord Campbell LC; adopted in *Charter v Charter* (1874) LR 7 HL 364 at 380-381 per Lord Cairns LC. As to the difficulties in applying this rule see *Lord Camoys v Blundell* (1848) 1 HL Cas 778; *Garland v Beverley* (1878) 9 ChD 213 at 218-219. The court does not conjecture that an error existed: *Mostyn v Mostyn* (1854) 5 HL Cas 155.

4 *Pitcairne v Brase* (1679) Cas temp Finch 403; *Dowset v Sweet* (1753) Amb 175; *Stockdale v Bushby* (1815) Coop G 229.

5 *Garth v Meyrick* (1779) 1 Bro CC 30; *Smith v Coney* (1801) 6 Ves 42; *Doe d Le Chevalier v Huthwaite* (1820) 3 B & Ald 632; *Bradshaw v Bradshaw* (1836) 2 Y & C Ex 72; *Lord Camoys v Blundell* (1848) 1 HL Cas 778; *Adams v Jones* (1852) 9 Hare 485; *Re Blackman* (1852) 16 Beav 377; *Re Feltham's Will Trusts* (1855) 1 K & J 528; *Hodgson v Clarke* (1860) 1 De GF & J 394 at 397; *Re Nunn's Trusts* (1875) LR 19 Eq 331; *Re Hooper, Hooper v Warner* (1902) 88 LT 160.

6 *Newbolt v Pryce* (1844) 14 Sim 354; *Garner v Garner* (1860) 29 Beav 114; *Gillett v Gane* (1870) LR 10 Eq 29; *Farrer v St Catherine's College, Cambridge* (1873) LR 16 Eq 19; *Garland v Beverley* (1878) 9 ChD 213; *Re Taylor, Cloak v Hammond* (1886) 34 ChD 255, CA.

7 A description of legatees as those 'named' in the will, although primarily referring to those mentioned by name, may denote persons merely specified or mentioned by another description: *Bromley v Wright* (1849) 7 Hare 334; *Re Holmes' Trusts* (1853) 1 Drew 321; *Seale-Hayne v Jodrell* [1891] AC 304 at 306, HL, per Lord Herschell, and at 309 per Lord Hannen.

8 *Bernasconi v Atkinson* (1853) 10 Hare 345 at 351.

9 Direct evidence of the intention of a testator who died before 1 January 1983, such as the instructions for his will, is not admissible unless both the name and description are equally, although not necessarily completely, applicable to two persons: *Lord Camoys v Blundell* (1848) 1 HL Cas 778; *Bernasconi v Atkinson* (1853) 10 Hare 345; *Drake v Drake* (1860) 8 HL Cas 172; *Charter v Charter* (1874) LR 7 HL 364 at 377, as explained in *Re Ray, Cant v Johnstone* [1916] 1 Ch 461; and see PARAS 506, 508 ante. In construing the will of a testator who died on or after 1 January 1983, direct evidence of his intention in such cases is more widely admissible: see PARAS 483, 507 ante.

10 *Bernasconi v Atkinson* (1853) 10 Hare 345 at 351-352, approved in *Re Fry, Mathews v Freeman* (1874) 22 WR 813, CA; *Re Lord Blayney's Trusts* (1875) IR 9 Eq 413; *Re Lyon's Trusts* (1879) 48 LJ Ch 245. See also PARA 497 et seq ante.

11 *Charter v Charter* (1874) LR 7 HL 364; *Re Brake* (1881) 6 PD 217; *Re Chappell* [1894] P 98; *Re Blake's Trusts* [1904] 1 IR 98.

12 *Drake v Drake* (1860) 8 HL Cas 172. See also PARA 347 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/569. Application of the rule.

569. Application of the rule.

The rule that, in a case of designation both by name and description, one part of the designation may prevail over the other¹ has been applied both to descriptions of donees² and of property³, and the court has rejected reference to particular parishes, streets or other localities⁴, to occupation⁵, to a particular tenure, such as freehold or leasehold⁶, to a mode of acquisition⁷ and to acreage⁸.

¹ See PARA 568 ante.

² *Ryall v Hannam* (1847) 10 Beav 536 (to 'E A, a natural daughter of' a named person, where the name and sex of the child were incorrect); *Re Rickit's Trusts* (1853) 11 Hare 299 (to a niece of a named person, where the only child was a nephew); *Ford v Batley* (1853) 17 Beav 303 (to a man living with a woman wrongly named, where evidence of surrounding circumstances was sufficient to identify the donee); *Stringer v Gardiner* (1859) 4 De G & J 468 ('to my niece E S'; a grandniece E J S was held entitled). See also *Doe d Gains v Rouse* (1848) 5 CB 422 ('my wife C', where the testator had a wife M but was living with C with whom he had contracted an invalid marriage); *Re Ingle's Trusts* (1871) LR 11 Eq 578 ('my late nephew M'; a nephew M who was still living was preferred to the testator's deceased brother of the same name); *Thomson v Eastwood* (1877) 2 App Cas 215 (where the legatee was described as 'the son of' a named person, the question whether he was born in lawful wedlock was immaterial; but see now paras 643-644 post); *Re Marquess of Bute, Marquess of Bute v Ryder* (1884) 27 ChD 196 (gift to person entitled under a deed of entail, there being no such deed); *Anderson v Berkley* [1902] 1 Ch 936 ('to A's wife L', where there was no marriage, although the testator was told that there had been one); *Re Hooper, Hooper v Warner* (1902) 88 LT 160 (to 'P H, son of C A H'; B H, one of three sons, held entitled).

³ *Day v Trig* (1715) 1 P Wms 286 (a devise of all freehold houses in a named locality where the testator had only leasehold houses); *Door v Geary* (1749) 1 Ves Sen 255 (stock wrongly named but correct in amount); *Drake v Martin* (1856) 23 Beav 89 (bank stock passed government stock otherwise sufficiently identified); *Ellis v Eden (No 2)* (1858) 25 Beav 482 (stock 'in my name' passed stock purchased but not transferred to testator); *Rowlatt v Easton* (1863) 2 New Rep 262 (name and amount of stock incorrect); *Burbey v Burbey* (1867) 15 LT 501; *Coltman v Gregory* (1870) 40 LJ Ch 352 (stock stated to be in joint names but actually in testator's name alone); *Norman v Norman* [1919] 1 Ch 297 (devise of land correctly described but wrongly stated to be purchased wholly from a named person). In *Mackinley v Sison* (1837) 8 Sim 561, *Power v Lencham* (1838) 2 Jo Ex Ir 728, and *Quennell v Turner* (1851) 13 Beav 240, stock 'standing in my name' passed stock standing in the name of trustees. See also *Williams v Williams* (1786) 2 Bro CC 87; *Maybery v Brooking* (1855) 7 De GM & G 673; *Wilson v Morley* (1877) 5 ChD 776; *Re Hodgson, Darley v Hodgson* [1899] 1 Ch 666.

⁴ *Owens v Bean* (1678) Cas temp Finch 395 (parish right, county wrong); *Hastead v Searle* (1679) 1 Ld Raym 728; *Brown v Longley* (1732) 2 Eq Cas Abr 416 pl 14; *Doe d Beach v Earl of Jersey* (1818) 1 B & Ald 550 (on appeal) (1825) 3 B & C 870; *Newton v Lucas* (1836) 1 My & Cr 391; *Gauntlett v Carter* (1853) 17 Beav 586; *Armstrong v Buckland* (1854) 18 Beav 204; *Tann v Tann* (1863) 2 New Rep 412; *Harman v Gurner* (1866) 35 Beav 478 (where, however, there was evidence of habitual misdescription by the testator); *Homer v Homer* (1878) 8 ChD 758, CA; *Re Mayell, Foley v Wood* [1913] 2 Ch 488.

⁵ *Blague v Gold* (1637) Cro Car 447, 473; *Goodtitle d Paul v Paul* (1760) 2 Burr 1089; *Marshall v Hopkins* (1812) 15 East 309 (where the words were transposed); *Goodtitle d Radford v Southern* (1813) 1 M & S 299; *Nightingall v Smith* (1848) 1 Exch 879; *Doe d Campton v Carpenter* (1850) 15 Jur 719; *White v Birch* (1867) 36 LJ Ch 174 (dissenting from *Doe d Parkin v Parkin* (1814) 5 Taunt 321); *Hardwick v Hardwick* (1873) LR 16 Eq 168.

⁶ *Denn d Wilkins v Kemeys* (1808) 8 East 366; *Doe d Dunning v Cranstoun* (1840) 7 M & W 1; *Nelson v Hopkins* (1851) 21 LJ Ch 410; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314; *Re Steel, Wappett v Robinson* [1903] 1 Ch 135 (where, however, there was evidence of local usage). Cf *Saxton v Saxton* (1879) 13 ChD 359. For instances where references to tenure were construed restrictively see PARA 563 ante.

⁷ *Hill v St John* (1775) 3 Bro Parl Cas 375; *Welby v Welby* (1813) 2 Ves & B 187 at 191; *Harrison v Hyde* (1859) 4 H & N 805; *Sealy v Stawell* (1868) IR 2 Eq 326 at 348; *Cooch v Walden* (1877) 46 LJ Ch 639. See also *Girdlestone v Creed* (1853) 10 Hare 480 at 487; *Thorpe v Tomson* (1588) 2 Leon 120.

⁸ *Whitfield v Langdale* (1875) 1 ChD 61 at 76-77.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/570. Change of circumstances between will and death.

570. Change of circumstances between will and death.

Although descriptions in a will must be construed according to the usual rules as to the circumstances to be taken into account¹, where a person or body who once satisfied the description no longer existed at the date of the will, another person or body existing at the date of the will, and satisfying the description inaccurately but sufficiently, may be entitled under the gift².

An accurate description of a donee by name is not as a rule affected, in the case of a person, by a change of name before the testator's death³, or, in the case of a society, corporation or body, by a change of name or by reorganisation if the donee substantially exists in the same nature as at the date of the will⁴. Accordingly, gifts to or for the purposes of a named hospital were not, in general, affected by the setting up of the National Health Service between the date of the will and the testator's death⁵. By the terms of the will, however, the use or adoption of a specified name⁶ at the testator's death⁷, or at the time of payment or vesting⁸, or at some other time⁹, may be a condition of the gift taking effect at all.

1 As to property see PARA 573 et seq post; and as to donees see PARA 590 et seq post.

2 *Dowset v Sweet* (1753) Amb 175 note (2); *Dooley v Mahon* (1877) IR 11 Eq 299; and see the cases cited in PARA 508 note 1 ante. As to a legacy to a non-existing or dissolved charitable institution see CHARITIES vol 8 (2010) PARAS 148-150, 156-157.

3 As to change of name generally see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1272-1275.

4 *Re Joy, Purday v Johnson* (1888) 60 LT 175 (amalgamation of two societies); *Re Wedgwood, Sweet v Cotton* [1914] 2 Ch 245 (charitable work carried on at same home, although transferred from one association to another); *Re Donald, Moore v Somerset* [1909] 2 Ch 410 (gift for benefit of volunteer and militia units substantially existing as the Territorial Army). Cf *Re Andrews, Dunedin Corp v Smyth* (1910) 29 NZLR 43 (effect of introduction of compulsory service); and see *Re Quibell's Will Trusts, White v Reichert* [1956] 3 All ER 679, [1957] 1 WLR 186 (bequest of shares in company to be formed passed shares although company was formed before death).

5 *Re Morgan's Will Trusts, Lewarne v Minister of Health* [1950] Ch 637, [1950] 1 All ER 1097; *Re Glass, Public Trustee v South-West Middlesex Hospital Management Committee* [1950] Ch 643n, [1950] 2 All ER 953n; *Re Hunter, Lloyds Bank Ltd v Girton College, Cambridge (Mistress and Governors)* [1951] Ch 190, [1951] 1 All ER 58; *Re Meyers, London Life Association v St George's Hospital* [1951] Ch 534, [1951] 1 All ER 538; *McClement's Trustees v Campbell* 1951 SC 167, Ct of Sess; *Thomson's Trustees v Leith Hospital* 1951 SC 533, Ct of Sess; *Re Little, Barclays Bank Ltd v Bournemouth and East Dorset Hospital Management Committee* [1953] 2 All ER 852, [1953] 1 WLR 1132. See also *Re Ginger, Wood Roberts v Westminster Hospital Board of Governors* [1951] Ch 458, [1951] 1 All ER 422; *Re Mills, Midland Bank Executor and Trustee Co Ltd v United Birmingham Hospitals Board of Governors* [1953] 1 All ER 835, [1953] 1 WLR 554. Cf *Re Buzzacott, Munday v King's College Hospital* [1953] Ch 28, [1952] 2 All ER 1011; *Re Bawden's Settlement, Besant v Board of Governors of the London Hospital* [1953] 2 All ER 1235, [1954] 1 WLR 33n; *Re Hayes' Will Trusts, Dobie v Board of Governors of the National Hospital* [1953] 2 All ER 1242, [1954] 1 WLR 22; *Connell's Trustees v Milngavie District Nursing Association* 1953 SC 230, Ct of Sess; *Mollison's Trustees v Aberdeen General Hospitals Board of Management* 1953 SC 264, Ct of Sess; *Re Adams, Gee v Barnet Group Hospital Management Committee* [1968] Ch 80, [1967] 3 All ER 285, CA ('endowing beds for paying patients' includes providing support for those who occupy the beds); and CHARITIES vol 8 (2010) PARA 154.

6 The word 'name' may be used in a figurative sense, as meaning 'stock': *Pyot v Pyot* (1749) 1 Ves Sen 335 (where a change of name by marriage did not exclude); *Doe d Wright v Plumtre* (1820) 3 B & Ald 474 at 482; *Carpenter v Bott* (1847) 15 Sim 606; *Re Maher, Maher v Toppin* [1909] 1 IR 70, Ir CA.

7 *Bon v Smith* (1596) Cro Eliz 532 (woman, who had changed name by marriage before testator's death; not entitled); *Jobson's Case* (1597) Cro Eliz 576 (marriage after testator's death; entitled).

8 *Doe d Wright v Plumtre* (1820) 3 B & Ald 474 at 482.

9 Eg at birth, so that the name is the family name: *Barlow v Bateman* (1735) 2 Bro Parl Cas 272; *Leigh v Leigh* (1808) 15 Ves 92.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/3. CONSTRUCTION OF WILLS/(3) PRINCIPLES OF CONSTRUCTION/(v) Misdescription of Property or Persons/571. Accuracy of generic description of property.

571. Accuracy of generic description of property.

A gift which accurately describes property of a generic nature (that is, property susceptible of increase or diminution between the date of the will and death¹) belonging to the testator at the date of the will does not fail where the description is sufficiently apt to indicate particular property belonging to the testator at his death, even though as a description of that property it is inaccurate, and that particular property accordingly passes under the gift², the inaccuracy being then of no importance. Where, out of several properties alleged to satisfy the description at the death, only one accurately satisfies it³, only that property passes under the gift⁴. Where no property at all is sufficiently described by the words of the will at the testator's death, the gift fails⁵. Where, however, the testator had neither at the date of the will nor at his death property accurately described by the words of the will, the court may from the circumstances be able to infer what was meant to be described, and the gift does not necessarily fail⁶. In the case of bequests of personal property, the gift may take effect as a general legacy⁷.

1 See PARA 573 post.

2 *Cooch v Walden* (1877) 46 LJ Ch 639; *Saxton v Saxton* (1879) 13 ChD 359 (devise of leasehold house held to carry freehold acquired after the date of the will). Cf *Re Willis, Spencer v Willis* [1911] 2 Ch 563 (plots purchased subsequently to devise of house 'in which I now reside' held to pass); *Re Reeves, Reeves v Pawson* [1928] Ch 351 (where 'my present lease' was held to refer, by virtue of a codicil confirming the will (see PARA 406 ante), to a renewed lease, the renewal being before the date of the codicil); *Re Fleming's Will Trusts, Ennion v Hampstead Old People's Housing Trust Ltd* [1974] 3 All ER 323, [1974] 1 WLR 1552 (devise of leasehold house held to carry freehold acquired after date of will notwithstanding absence of merger). See also *Higgins v Dawson* [1902] AC 1, HL.

3 As to the rule of construction in such a case see PARA 563 ante.

4 *Emuss v Smith* (1848) 2 De G & Sm 722; *Re Portal and Lamb* (1885) 30 ChD 50, CA; *Cave v Harris, Harris v Cave* (1887) 57 LT 768; *Re Potter, Stevens v Potter* (1900) 83 LT 405. See also *Webb v Byng* (1855) 1 K & J 580 at 594 (after-acquired property held not to pass under the name testatrix was wont to use as to other property).

5 *Barber v Wood* (1877) 4 ChD 885; *Re Knight, Knight v Burgess* (1887) 34 ChD 518.

6 *Re Jameson, King v Winn* [1908] 2 Ch 111 at 116. See also *King v Wright* (1845) 14 Sim 400; *Flood v Flood* [1902] 1 IR 538; but see *Re Lewis's Will Trusts, Lewis v Williams* [1984] 3 All ER 930, [1985] 1 WLR 102 (where a gift of 'my freehold farm' was held not to carry the testator's holding of three-quarters of the issued shares in a family farming company which owned a farm and other assets, even though the testator owned the shares at the date of his will as well as at the date of his death). Where the testator died on or after 1 January 1983, evidence of his intention may be admissible: see PARAS 483, 507 ante.

7 *Selwood v Mildmay* (1797) 3 Ves 306; *Lindgren v Lindgren* (1846) 9 Beav 358; and see PARA 503 note 3 ante. See also *Findlater v Lowe* [1904] 1 IR 519.

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572. Accuracy of specific descriptions.

Where specific property existing at the date of the will is described, the whole of that property may pass under the gift notwithstanding that at the date of the death the description applies accurately to part only of that property¹.

1 Re Evans, *Evans v Powell* [1909] 1 Ch 784; cf *Re Willis, Spencer v Willis* [1911] 2 Ch 563.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(i) In general/573. Will speaks from death.

4. CONSTRUCTION OF PARTICULAR DISPOSITIONS

(1) PROPERTY PASSING

(i) In general

573. Will speaks from death.

Unless a contrary intention appears in it¹, a will² must be construed, with reference to the real estate³ and personal estate⁴ comprised in it⁵, to speak and take effect as if it had been executed immediately before the testator's death⁶, and as if the condition of things to which it refers in this respect is that existing immediately before his death⁷. This provision does not, however, preclude the investigation of circumstances at the date of the will in order to ascertain whether a gift has been adeemed⁸.

Where the thing given is generic⁹, so that the description may from time to time apply to different amounts of property of like nature or to different objects, the effect of the rule, if applicable, is that the property answering the description at the testator's death passes under the gift¹⁰.

No contrary intention is shown by the mere use of a possessive adjective¹¹ in the case of such a generic gift¹², or by a description of the property as being that of which the testator is seised or possessed¹³. A description of the property as that which the testator 'now' owns or occupies may according to the circumstances¹⁴, but it appears *prima facie* does not, show a contrary intention so as to exclude after-acquired property of the generic nature¹⁵.

These provisions¹⁶ do not, however, affect a description of some specific thing existing at the date of the will¹⁷.

1 See the text and notes 11-15 *infra*.

2 For the meaning of 'will' see PARA 301 *ante*.

3 For these purposes, 'real estate' includes manors, advowsons, messuages, land, tithes, rents and hereditaments, whether corporeal, incorporeal or personal, and any estate, right or interest (other than a chattel interest) therein: Wills Act 1837 s 1 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). As to the abolition of copyhold and customary tenure see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 641 *et seq*. An undivided share in land can now exist only in equity: see REAL PROPERTY vol 39(2)

(Reissue) PARA 207 et seq. As to tithes see ECCLESIASTICAL LAW vol 14 para 1209 et seq; and as to devises of 'land' and other general devises see PARA 575 post.

4 For these purposes, 'personal estate' includes leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estates), debts, choses (or things) in action, rights, credits, goods and all other property whatsoever which by law devolves upon the executor or administrator, and any share or interest therein: Wills Act 1837 s 1. So far as this definition of 'personal estate' refers to property which devolves on the executor or administrator, it must be understood as excepting real estate, although by virtue of enactments passed since the Wills Act 1837 real estate in which a deceased had an interest not ceasing on his death now devolves on his personal representative: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363. As to bequests of 'personal estate' see PARA 579 post. For the purposes of conflict of laws, the distinction is not between personalty and realty as in the case of wills, but between immovables and movables: see *Re Grassi, Stubberfield v Grassi* [1905] 1 Ch 584 at 590-591; *Re Lyne's Settlement Trusts, Re Gibbs, Lyne v Gibbs* [1919] 1 Ch 80, CA; *Re Cartwright, Cartwright v Smith* [1939] Ch 90, [1948] 4 All ER 209, CA. See also CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 380 et seq, 432 et seq.

5 This includes property subject to a general (but not a special) power exercised by the will (see POWERS vol 36(2) (Reissue) PARAS 310, 318), even where the will purports to exercise a power over property which at the testator's death has become his absolute property (*Re James, Hole v Bethune* [1910] 1 Ch 157). The phrase 'with reference to the real and personal estate comprised in it' only subjects after-purchased and after-acquired estates to the dispositions previously made: *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 432 per Turner LJ. The Wills Act 1837 does not resolve a doubt which may exist as to whether particular property is passed by a specific or residuary gift: *Re Portal and Lamb* (1885) 30 ChD 50 at 55, CA, per Lindley LJ. A release of debts to a specified person is within the Wills Act 1837 s 24 (*Everett v Everett* (1877) 7 ChD 428, CA); but see *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201 (right of surety's executors to indemnity against claims made after his death under his guarantee not included in release of 'all debts'). The question whether the rule that a will speaks from death applies to exceptions from gifts was raised in *Hughes v Jones* (1863) 1 Hem & M 765 at 770. As to descriptions of things not comprised in the will cf *Re Williams, James v Williams* (1910) 26 TLR 307 (direction to pay debts of chapels held to extend to debts incurred and chapels built after testator's death).

6 Wills Act 1837 s 24. Before the Wills Act 1837, a will spoke as regards personal estate from the death (*Re Chapman, Perkins v Chapman* [1904] 1 Ch 431 at 436, CA), and as regards real estate from the date of the will, unless the contrary intention was shown: see PARA 328 note 3 ante. Thus the effect of the Wills Act 1837 was to extend to real estate the rule of construction as to the time from which the will was to be taken to speak which before that Act was applicable to personal estate: *Cole v Scott* (1849) 1 Mac & G 518. The Wills Act 1837 s 24 applies to the will of a married woman made during coverture: Married Women's Property Act 1893 s 3.

7 *Higgins v Dawson* [1902] AC 1 at 7, HL.

8 See *Re Edwards, Macadam v Wright* [1958] Ch 168 at 176, [1957] 2 All ER 495 at 501, CA, per Jenkins LJ. As to ademption see PARAS 445-449 post.

9 It may increase, diminish or otherwise change during the testator's life: *Goodlad v Burnett* (1855) 1 K & J 341 at 349; *Re Slater, Slater v Slater* [1906] 2 Ch 480 at 485; *Re Gillins, Inglis v Gillins* [1909] 1 Ch 345. The Wills Act 1837 s 24 does not, however, merely apply to a residuary gift; it applies to specific gifts: *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 436-437; *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22 at 25, CA. As to the effect of a general devise of the testator's real or personal property in exercising a general power see POWERS vol 36(2) (Reissue) PARAS 310, 316.

10 Eg where the testator acquired further property of the same kind (*Lady Langdale v Briggs* (1856) 8 De GM & G 391 (where 'all my freehold lands' and 'all my leasehold lands' included those held at death); *Trinder v Trinder* (1866) LR 1 Eq 695 (where 'my shares in the Great Western Railway' included stock purchased subsequent to the will); *Lysaght v Edwards* (1876) 2 ChD 499 at 505 (general gift of real estate); *Everett v Everett* (1877) 7 ChD 428, CA (where debts released by the will were held to include those contracted after it was made); *Re Russell, Russell v Chell* (1882) 19 ChD 432 (where a bequest of the testator's share in a partnership passed the whole business, the testator having bought out his partners before death)); or where he acquired a further or different interest, but the property still satisfies the description (*Saxton v Saxton* (1879) 13 ChD 359 ('my term and interest in the leasehold dwelling house' specified; purchase of reversion to leasehold); *Re Quibell's Will Trusts, White v Reichert* [1956] 3 All ER 679, [1957] 1 WLR 186 (bequest of shares in company to be formed after the testator's death; bequest carried shares although company was formed before death)). In *Re Gillins, Inglis v Gillins* [1909] 1 Ch 345, a gift of '25 shares' passed only shares as subdivided after the date of the will; but this case was explained as a case of a general legacy in *Re Clifford, Mallam v McFie* [1912] 1 Ch 29 at 31. See also *Re M'Affee, Mack v Quirey* [1909] 1 IR 124. In *Re Davies, Scourfield v Davies* [1925] Ch 642, a gift of the 'proceeds of such parts as have been sold' was held to refer to the parts sold at the testator's death.

A gift of the testator's land in a certain locality thus prima facie passes all the land he has in that locality at the time of his death: *Doe d York v Walker* (1844) 12 M & W 591 ('all . . . lands . . . which I am seised of . . . in the parish or lordship of Great Bowden'); *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22 at 25, CA ('my leasehold houses situate at C'); *Re Bridger, Brompton Hospital for Consumption v Lewis* [1894] 1 Ch 297 at 302, CA, per

Davey LJ. The additional property may pass notwithstanding that it has been specifically devised by a codicil, if the specific devise fails: *Re Davies, Thomas v Thomas-Davies* [1928] Ch 24.

11 *Goodlad v Burnett* (1855) 1 K & J 341; *Ferguson v Ferguson* (1872) IR 6 Eq 199 ('my stock in trade and debts accruing therefrom'); *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22, CA; *Re Russell, Russell v Chell* (1882) 19 ChD 432; *Re Bancroft, Bancroft v Bancroft* [1928] Ch 577.

12 It is otherwise where the gift is not generic and the possessive pronoun then shows a contrary intention: *Re Sikes, Moxon v Crossley* [1927] 1 Ch 364 ('my piano'). Such a possessive adjective may be an indication that the gift is not generic: see *Goodlad v Burnett* (1855) 1 K & J 341 at 348-349; and note 17 infra.

13 *Doe d York v Walker* (1844) 12 M & W 591; *Re Horton, Lloyd v Hatchett* [1920] 2 Ch 1 (copyholds 'now held by me'); *Re Davies, Scourfield v Davies* [1925] Ch 642; *Re Fleming's Will Trusts, Ennion v Hampstead Old People's Housing Trust Ltd* [1974] 3 All ER 323, [1974] 1 WLR 1552 (where a devise of 'my leasehold house' was held to carry a freehold interest acquired after the date of the will). Cf *Re Fowler, Fowler v Wittingham* (1915) 139 LT Jo 183 (where a devise of 'my house and land known as [R] wherein I now reside' was held to include adjoining fields bought at the same time as the house and let to tenants, but not adjoining land bought after the date of the will).

14 *Cole v Scott* (1849) 1 Mac & G 518 (where, however, the testator distinguished certain property which should be vested in him at his death). See also *A-G v Bury* (1701) 1 Eq Cas Abr 201; *Hutchinson v Barrow* (1861) 6 H & N 583; *Williams v Owen* (1863) 2 New Rep 585; *Re Edwards, Rowland v Edwards* (1890) 63 LT 481. As to *Cole v Scott* supra see *Re Farrer's Estate* (1858) 8 ICLR 370 at 377-378; and the cases cited in note 15 infra.

15 *Wagstaff v Wagstaff* (1869) LR 8 Eq 229 ('which I now possess'). See also *Hepburn v Skirving* (1858) 4 Jur NS 651 (where it was held that 'now' must be understood to refer to the death); *Re Midland Rly Co* (1865) 34 Beav 525; *Re Ashburnham, Gaby v Ashburnham* (1912) 107 LT 601 ('all my effects at present at A'; no contrary intention). Cf *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 437 per Turner LJ; *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22, CA ('subject to the annuity now charged thereon'; no contrary intention). In *Re Champion, Dudley v Champion* [1893] 1 Ch 101 at 107-108, CA, per North J, the words 'and now in my own occupation', and in *Re Willis, Spencer v Willis* [1911] 2 Ch 563 at 568, the words 'and in which I now reside', were treated as a mere additional description of the property, and not a vital or essential part of the description cutting down the earlier words, which were read as applied to the circumstances existing at the testator's death, and, therefore, the words quoted were rejected. Similarly, in *Re Horton, Lloyd v Hatchett* [1920] 2 Ch 1, the words 'now held by me' were treated as mere additional description, not cutting down the earlier part of the devise. As to whether there is any principle on which the court may reject such words cf *Magee v Lavell* (1874) LR 9 CP 107 at 113; and PARA 561 et seq ante. As to the effect in general of adverbs of time in a will cf para 538 ante.

16 Ie the Wills Act 1837 s 24: see the text and notes 1-6 supra.

17 *Emuss v Smith* (1848) 2 De G & Sm 722 at 733, 736 (where 'all that my freehold estate . . . purchased of B' did not comprise a parcel of leasehold mixed with it, even though the testator subsequently bought the reversion); cf *Re Fleming's Will Trusts, Ennion v Hampstead Old People's Housing Trust Ltd* [1974] 3 All ER 323, [1974] 1 WLR 1552 (cited in note 13 supra); *Douglas v Douglas* (1854) Kay 400 (money 'which has been charged' on certain land); *Re Gibson, Mathews v Foulsham* (1866) LR 2 Eq 669 at 672 ('my 1,000 NBR shares'); *Re Portal and Lamb* (1885) 30 ChD 50, CA ('my cottage and land'); *Cave v Harris, Harris v Cave* (1887) 57 LT 768 at 770; *Re Evans, Evans v Powell* [1909] 1 Ch 784 ('house and effects known as C Villa'); *Re Alexander, Bathurst v Greenwood* [1910] WN 94, CA. As to the ademption of specific gifts see PARAS 445-448 ante.

UPDATE

573 Will speaks from death

NOTE 8--See also *Sammur v Manzi* [2008] UKPC 58, [2009] 2 All ER 234.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(i) In general/574. Accessories follow the principal gift.

574. Accessories follow the principal gift.

It is a rule applicable to a gift by will¹, as well as to a grant by deed², that all rights and benefits which are necessary and essential³ elements in the reasonable enjoyment of the subject matter of the gift in the state in which it is given⁴ are prima facie included⁵. This result does not necessarily arise from construction, but from the circumstance of necessary dependence shown by the facts of the case; and, when all surrounding circumstances which may legitimately be inquired into are known, there may be no implied gift or the extent of it may be controlled⁶.

1 *Pearson v Spencer* (1863) 3 B & S 761, Ex Ch; *Phillips v Low* [1892] 1 Ch 47 at 51; *Milner's Safe Co Ltd v Great Northern and City Rly Co* [1907] 1 Ch 208 at 219. See also *Taws v Knowles* [1891] 2 QB 564, CA.

2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58.

3 *Palmer v Fletcher* (1663) 1 Lev 122.

4 See *Pheysey v Vicary* (1847) 16 M & W 484 (road to house not included); *Ewart v Cochrane* (1861) 4 Macq 117 at 122, HL.

5 *Shep Touch* (8th Edn) 89. See also *Re Livingstone, Livingstone v Durel* (1917) 61 Sol Jo 384 ('moneys which shall arise from sale of land in Ireland' held to include bonuses paid on statutory sale). Cf DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58. As to income and capital receipts see SETTLEMENTS vol 42 (Reissue) PARA 944 et seq.

6 *Phillips v Low* [1892] 1 Ch 47 at 50-51. See also *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 ChD 295 at 308, 311, 315, CA. As to the right to accumulations of income see *Re Woolf, Public Trustee v Lazarus* [1920] 1 Ch 184 (not included); *Re Mellor, Alvarez v Dodgson* [1922] 1 Ch 312, CA (not included); *Re Blackwell, Blackwell v Blackwell* [1926] Ch 223, CA (included). As to the right to a contingent preference dividend see *Re Marjoribanks, Marjoribanks v Dansey* [1923] 2 Ch 307 (included). As to the disposal of surplus income when accumulation stops see *Re Thornber, Crabtree v Thornber* [1937] Ch 29, [1936] 2 All ER 1594, CA (surplus income dealt with as income of undisposed residuary estate); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1149-1152. As to the title to repaid income tax on accumulations during minority see *Re Fulford, Fulford v Hyslop* [1930] 1 Ch 71 (beneficiary absolutely entitled). As to the title to accretions to shares in a company see *Re Buxton, Buxton v Buxton* [1930] 1 Ch 648 (included). A gift of national savings certificates includes accretions to them as these are capitalised: *Re Holder's Will Trusts, National Provincial Bank Ltd v Holder* [1953] Ch 468, [1953] 2 All ER 1.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(i) In general/575. General description of property.

575. General description of property.

A description of property of any kind in a general manner such as 'land', 'personal estate', and the like, not identifying any particular item of such property, prima facie¹ includes all interest, legal or equitable², vested or contingent³, in possession, reversion, remainder or expectancy⁴, in property of that kind⁵, capable of being so disposed of⁶ by the testator's will⁷. Prima facie, general descriptions of property are construed in their general sense⁸, but are capable of being controlled by the context, for example under the ejusdem generis rule⁹. The terms 'legacy' and 'bequest' in their ordinary sense are used of a gift of money or a chattel¹⁰, but with a proper controlling context are capable of meaning a devise of land¹¹. As a matter of construction, an annuity may be included in the term 'legacy'¹².

A description of property which in its usual sense is apt to include kinds of property of both a real and personal nature is not restricted to real estate only, or to personal estate only, by reason that the limitations are more applicable to that particular kind of property, or are even inapplicable to any but that particular kind of property¹³, although this is an indication to be considered in connection with the whole context¹⁴.

A general description of chattels which is made the subject of a gift for life and other interests in succession may not include consumable chattels or livestock if, on the true construction of the will, the testator evinces an intention only to dispose of chattels having a permanent existence¹⁵.

1 For an example of a contrary intention shown by the will taken as a whole see *Teatt v Strong* (1760) 3 Bro Parl Cas 219, HL. The contrary intention must amount to an intention to exclude such interests, as distinct from an absence of the intention to include them: *Doe d Lord and Lady Cholmondeley v Weatherby* (1809) 11 East 322 at 333; *Doe d Pell v Jeyes* (1830) 1 B & Ad 593 at 600; *Doe d Howell v Thomas* (1840) 1 Man & G 335 at 344.

2 Thus a general devise of the testator's land, or land in a particular locality, includes land contracted to be purchased and not actually conveyed to him (*Greenhill v Greenhill* (1711) 2 Vern 679; *Atcherley v Vernon* (1723) 10 Mod Rep 518; *Holmes v Barker* (1816) 2 Madd 462), and an option to purchase the testator's land includes land contracted to be purchased but not actually conveyed to him (*Re Fison's Will Trusts, Fison v Fison* [1950] Ch 394, [1950] 1 All ER 501). For other general descriptions of property see *Collison v Girling* (1838) 4 My & Cr 63 at 75 (consols); *Re Stevens, Stevens v Keily* [1888] WN 110 ('my estate share and interest' in a business). A description of stock of, or to, which the testator may 'be possessed or entitled' at his death does not ordinarily include stock purchased on his instructions, but after his death: *Thomas v Thomas* (1859) 27 Beav 537.

3 *Ingilby v Amcotts* (1856) 21 Beav 585.

4 *Wheeler v Walroone* (1647) Aleyn 28; *Ridout v Pain* (1747) 3 Atk 486 at 492; *Re Egan, Mills v Penton* [1899] 1 Ch 688 ('money in my possession' passed reversionary interest; but cf *Re Lucas-Tooth, Lucas-Tooth v Public Trustee* (1923) 156 LT Jo 382 ('die possessed of' is inapplicable to a reversionary aliquot interest in stocks and shares)). See also *Church v Mundy* (1808) 15 Ves 396; *Doe d Howell v Thomas* (1840) 1 Man & G 335; *Tennent v Tennent* (1844) 1 Jo & Lat 379 at 389 (where the fact that property was limited to the same uses as the land under the uses of which the testator's interest arose was not sufficient to exclude that interest); *Alliston v Chapple* (1860) 6 Jur NS 288 (remainder in specific real estate given by the same will). Similarly, an unsettled reversion in settled land passes under a gift of 'lands not settled' (*Cook v Garrard* (1668) 1 Lev 212; *Chester v Chester* (1730) 3 P Wms 56; *Glover v Spendlove* (1793) 4 Bro CC 337; *A-G v Vigor* (1803) 8 Ves 256; *Jones v Skinner* (1835) 5 Lj Ch 87; *Incorporated Society in Dublin v Richards* (1841) 1 Dr & War 258), and 'property not included in' a certain settlement may include an absolute interest under an ultimate trust in that settlement (*O'Reilly v Smith* (1851) 17 LTOS 280; *Re Green, Walsh v Green* (1893) 31 LR Ir 338). Expressions of this kind, however, are ambiguous and capable of meaning either the land not comprised in the settlement, or so much of the land in settlement as is not subject to the trusts of the settlement: *Ford v Ford* (1848) 6 Hare 486 at 494; *Incorporated Society in Dublin v Richards* supra at 280-281. See also *Goodtitle d Daniel v Miles* (1805) 6 East 494; *Re Mather, Mather v Mather* [1927] WN 13.

5 As to mortgages and leasehold interests with regard to a gift of 'land' see further PARA 582 post; and as to growing crops see PARA 582 post. A devise of real estate may not include charges thereon to which the testator was entitled: *Davy v Redington* [1917] 1 IR 250, Ir CA. In *Re Shepherd, Mitchell v Loram* (1914) 58 Sol Jo 304, a gift and bequest of 'all' was held to include real estate.

6 As to the exercise of an after-acquired power see POWERS vol 36(2) (Reissue) PARAS 315, 325.

7 A different rule applies where the question is whether the testator is purporting to dispose of the property of another so as to bring the doctrine of election into play. In such a case the intention to dispose of the property of the other person must appear clearly and distinctly, and general words will not usually be construed to include such property: see eg *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490 (where a bequest of 'all the remainder of my property' did not extend to anything which was not the testator's property). See also EQUITY vol 16(2) (Reissue) PARA 724.

8 See PARA 532 ante.

9 As to the ejusdem generis rule see PARA 541 ante.

10 *Windus v Windus* (1856) 6 De GM & G 549; *Ward v Grey* (1859) 26 Beav 485 at 494 (real estate directed to be sold included, but not real estate not to be sold); *White v Lake* (1868) LR 6 Eq 188 at 192 (proceeds of real estate not included); *Re King's Trusts* (1892) 29 LR Ir 401 at 410 (interest in realty not included). A gift of residue, however, is not a 'legacy' in the ordinary sense: *Ward v Grey* supra. In *Re Kennedy, Corbould v Kennedy* [1917] 1 Ch 9, CA, a life interest in residue was held to be a bequest within a provision making bequests free of death duties.

11 *Brady v Cubitt* (1778) 1 Doug KB 31 at 40 per Lord Mansfield CJ. See also *Beckley v Newland* (1723) 2 P Wms 182 at 186 per Lord Macclesfield LC; *Hope d Brown v Taylor* (1757) 1 Burr 268; *Whicker v Hume* (1851) 14 Beav 509 at 518; *Gyett v Williams* (1862) 2 John & H 429 at 436. For cases in which the appointment of a 'residuary legatee' will give to the appointee the residuary real estate see PARA 589 post.

12 *Bromley v Wright* (1849) 7 Hare 334; cf *Re Feather, Harrison v Tapsell* [1945] Ch 343, [1945] 1 All ER 552.

13 Eg gifts of 'property', or of a residue of estates and effects and similar gifts (*Doe d Burkitt v Chapman* (1789) 1 Hy Bl 223; *Morgan d Surman v Surman* (1808) 1 Taunt 289; *Doe d Wall v Langlands* (1811) 14 East 370; *Thomas v Phelps* (1828) 4 Russ 348 at 351; *Ackers v Phipps* (1835) 3 Cl & Fin 665 at 691, HL; *Hunter v Pugh* (1839) 4 Jur 571; *Morrison v Hoppe* (1851) 4 De G & Sm 234; *D'Almaine v Moseley* (1853) 1 Drew 629; *Fullerton v Martin* (1853) 22 LJ Ch 893; *O'Toole v Browne* (1854) 3 E & B 572; *Re Greenwich Hospital Improvement Act* (1855) 20 Beav 458; *Streatfeild v Cooper* (1859) 27 Beav 338; *Hamilton v Buckmaster* (1866) LR 3 Eq 323; *Stein v Ritherdon* (1868) 37 LJ Ch 369 at 371; *Lloyd v Lloyd* (1869) LR 7 Eq 458; *Cameron v Harper* (1892) 21 SCR 273; *Kirby-Smith v Parnell* [1903] 1 Ch 483); or land with its appurtenances where leasehold land was blended in enjoyment with freehold (*Hobson v Blackburn* (1833) 1 My & K 571); or other gifts where the will shows that the testator had other kinds of property present to his mind and the trusts can be applied to such portion of the blended property as is capable of being so taken (*Saumarez v Saumarez* (1839) 4 My & Cr 331; explained in *Stokes v Salomons* (1851) 9 Hare 75 at 83). In *Re Fetherston-Haugh-Whitney's Estate* [1924] 1 IR 153, Ir CA, 'property' was restricted in the context to personal estate. Gifts to trustees took effect subject to resulting trusts as to parts of the property in *Dunnage v White* (1820) 1 Jac & W 583 and *Longley v Longley* (1871) LR 13 Eq 133.

14 *Fullerton v Martin* (1853) 22 LJ Ch 893; *Prescott v Barker* (1874) 9 Ch App 174; *Kirby-Smith v Parnell* [1903] 1 Ch 483. See also *Newland v Marjoribanks* (1813) 5 Taunt 268; *Doe d Hurrell v Hurrell* (1821) 5 B & Ald 18; *Coard v Holderness* (1855) 20 Beav 147; *Doe d Spearing v Buckner* (1796) 6 Term Rep 610 (which was doubted in *Fullerton v Martin* supra); *Pogson v Thomas* (1840) 6 Bing NC 337 (which was doubted in *Stein v Ritherdon* (1868) 37 LJ Ch 369). Such indications, however, become of less weight where there is a direction for sale and distribution: *Dobson v Bowness* (1868) LR 5 Eq 404 at 408. See also *O'Toole v Browne* (1854) 3 E & B 572; *Streatfeild v Cooper* (1859) 27 Beav 338.

15 *Porter v Tournay* (1797) 3 Ves 311 at 313; *Sealy v Stawell* (1868) IR 2 Eq 326 at 348; *Re Moir's Estate, Moir v Warner* [1882] WN 139 (heirlooms). See also PARA 413 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(ii) Effect of Description by Locality/576. Property included.

(ii) Effect of Description by Locality

576. Property included.

A description of property by its locality¹ does not in general include property in any other locality at the testator's death², unless the restriction to that locality is to be rejected on the principle of 'falsa demonstratio non nocet'³. If, however, the property described is movable, the intention is inferred, unless the context is to the contrary⁴, that the gift includes property which is usually in that situation and has been removed merely temporarily⁵, or of necessity for its preservation⁶, or, it seems, wrongly⁷, but not in general property otherwise removed for an indefinite length of time⁸ or permanently⁹. Further, as choses (or things) in action are not considered as absolutely localised¹⁰, a general description of property in a certain locality *prima facie*¹¹ does not include any choses in action due, payable or recoverable there, or represented by documents, other than Bank of England notes or other notes treated as cash¹², which are kept there¹³, unless the locality is a place where such documents are usually kept¹⁴. A description of chattels in a certain receptacle does not ordinarily include articles in that specified place which are mere accessories to any things in another place¹⁵, but may include such sum of money¹⁶ as may ordinarily be found there¹⁷.

1 A restriction to a locality in the light of the context only applied to part of the gift in *Norris v Norris* (1846) 2 Coll 719; *Domville v Taylor* (1863) 32 Beav 604. A gift of 'the contents' of a leasehold residence ordinarily includes everything which could, as between landlord and tenant, be removed by the testator from the house: *Re Oppenheim*, *Oppenheim v Oppenheim* (1914) 111 LT 937.

2 *Earl of Shaftesbury v Countess of Shaftesbury* (1716) 2 Vern 747; *Green v Symonds* (1730) 1 Bro CC 129n; *Heseltine v Heseltine* (1818) 3 Madd 276; *Colleton v Garth* (1833) 6 Sim 19; *Houlding v Cross* (1855) 1 Jur NS 250; *Spencer v Spencer* (1856) 21 Beav 548; *Blagrove v Coore* (1859) 27 Beav 138; *Wilkins v Jodrell* (1863) 11 WR 588. This holds good even if the property is acquired, or brought to that locality, after the date of the will: see *Gayre v Gayre* (1705) 2 Vern 538; *Sayer v Sayer* (1714) 2 Vern 688. For examples as to real estate see PARA 563 note 7 ante. Goods in transit to the named locality do not pass (*Duke of Beaufort v Lord Dundonald* (1716) 2 Vern 739; *Lord Brooke v Earl of Warwick* (1848) 2 De G & Sm 425; *Lane v Sewell* (1874) 43 LJ Ch 378), but in *Lord Brooke v Earl of Warwick* supra pictures temporarily away from the mansion for cleaning passed.

3 A false description does not vitiate when there is no doubt as to the subject meant. See *Land v Devaynes* (1794) 4 Bro CC 537; *Norreys v Franks* (1875) 19 Q 18 at 34; *Re Brimble*, *Brimble v Brimble* (1918) 144 LT Jo 217. As to the principle of 'falsa demonstratio non nocet' see PARA 561 ante.

4 *Re Earl of Stamford*, *Hall v Lambert* (1906) 22 TLR 632, CA.

5 *Lord Brooke v Earl of Warwick* (1848) 2 De G & Sm 425; *Spencer v Spencer* (1856) 21 Beav 548 at 549; *Bruce v Curzon Howe* (1870) 19 WR 116; *Rawlinson v Rawlinson* (1876) 34 LT 848; *Re Lea*, *Wells v Holt* (1911) 104 LT 253.

6 *Chapman v Hart* (1749) 1 Ves Sen 271 at 273 (goods in a ship; original situation was temporary and precarious); *Moore v Moore* (1781) 1 Bro CC 127 at 129; *Re Johnston*, *Cockerell v Earl of Essex* (1884) 26 ChD 538 at 553-554; *Re Baxendale*, *Baxendale v Baxendale* (1919) 148 LT Jo 139 (plate at bank for safety).

7 *Earl of Shaftesbury v Countess of Shaftesbury* (1716) 2 Vern 747 at 748.

8 *Re Baroness Zouche*, *Dugdale v Baroness Zouche* [1919] 2 Ch 178; *Re Heilbronner*, *Nathan v Kenny* [1953] 2 All ER 1016, [1953] 1 WLR 1254.

9 Except in such cases as are referred to in notes 6-7 supra, permanent removal adeems the gift (*Green v Symonds* (1730) 1 Bro CC 129n; and see the cases cited in note 2 supra), even if unknown to the testator, but made by an authorised agent (*Earl of Shaftesbury v Countess of Shaftesbury* (1716) 2 Vern 747). For the meaning of the 'contents' of a house see PARA 587 post.

10 See CHOSER IN ACTION VOL 13 (2009) PARA 2.

11 For cases where sufficient intention to the contrary was shown see *Scorey v Harrison* (1852) 16 Jur 1130; *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613; *Guthrie v Walrond* (1883) 22 ChD 573; *Re Prater*, *Desing v Beare* (1888) 37 ChD 481, CA ('half of my property at R's bank'); *Re Robson*, *Robson v Hamilton* [1891] 2 Ch 559; *Re Clark*, *McKecknie v Clark* [1904] 1 Ch 294 (where of two localities, that of the bond debtor and that of the certificate, the latter was preferred); *Young v Bain*, *Re Young* (1902) 21 NZLR 503.

12 *Popham v Lady Aylesbury* (1748) Amb 68; *Brooke v Turner* (1836) 7 Sim 671; *Mahony v Donovan* (1863) 14 I Ch R 262 at 388, Ir CA. See also *Re Robson*, *Robson v Hamilton* [1891] 2 Ch 559 at 560. As to gifts of money see further PARA 584 post.

13 *Chapman v Hart* (1749) 1 Ves Sen 271; *Moore v Moore* (1781) 1 Bro CC 127 (bond); *Jones v Lord Sefton* (1798) 4 Ves 166; *Nisbett v Murray*, *Murray v Nisbett* (1799) 5 Ves 149; *Fleming v Brook* (1804) 1 Sch & Lef 318 (where the rule was adhered to in spite of an exception of a specified chose in action); *Stuart v Marquis of Bute* (1806) 11 Ves 657 at 662; *Brooke v Turner* (1836) 7 Sim 671 (promissory notes and mortgage); *Marquis of Hertford v Lord Lowther* (1843) 7 Beav 1; *Rhodes v Rhodes* (1874) 22 WR 835; *Thorne v Thorne* (1903) 33 SCR 309; *Lazarus v Lazarus* (1919) 88 LJ Ch 525, CA (bearer bonds, certificates and share scrip). In *Re O'Brien*, *O'Brien v O'Brien* [1906] 1 IR 649, Ir CA, an intention excluding even a sum of cash was found in the will.

14 Eg a bureau, desk, box or bank where documents and money are usually kept: *Roberts v Kuffin* (1741) 2 Atk 112; *Re Robson*, *Robson v Hamilton* [1891] 2 Ch 559, followed in *Speaker's Executor v Spicker* 1969 SLT (Notes) 7, Ct of Sess (where a gift of a bureau and contents passed money in it also, there being nothing to suggest that the testator meant to distinguish between the different types of property). A gift of a 'box' or other receptacle does not ordinarily include securities which it contains: *Re Hunter*, *Northey v Northey* (1908) 25 TLR 19; *Joseph v Phillips* [1934] AC 348, PC (where a gift of 'personal effects, including desk with contents' was held not to include pass books and promissory notes in the desk). See also *McAfee v Kerr* (1918) 52 ILT 178. As to a bequest of the contents of a room see *Re Neilson*, *Cumming v Clyde* (1929) 73 Sol Jo 765.

15 Eg title deeds or the key to another receptacle: *Brooke v Turner* (1836) 7 Sim 671 at 681; *Re Robson, Robson v Hamilton* [1891] 2 Ch 559 at 565; *Re Craven, Crewdson v Craven* (1908) 99 LT 390 (affd (1909) 100 LT 284, CA) (gift of a house and its contents; bonds and securities were excluded). See also *McAfee v Kerr* (1918) 52 ILT 178. As to the general rule as to accessories see PARA 574 ante.

16 *Swinfen v Swinfen (No 4)* (1860) 29 Beav 207.

17 *Chapman v Hart* (1749) 1 Ves Sen 271 at 273 per Lord Hardwicke LC ('if not an extraordinary sum, and just received').

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/577. 'Appurtenances', 'appertaining' etc.

(iii) Effect of Particular Words

577. 'Appurtenances', 'appertaining' etc.

Land does not pass under the word 'appurtenances' used with reference to other land and in its strict technical sense, but it does pass if it appears that a wider sense was intended to be given to the word¹, as in the case of a gift of 'land appertaining' to other land². Choses (or things) in action do not ordinarily pass as appertaining to other property³.

1 *Buck d Whalley v Nurton* (1797) 1 Bos & P 53 at 57.

2 In the following cases land was held to pass under 'appurtenances' in a gift of a house with its appurtenances, or under a gift of a house simply, with a suitable context: *Hardwood and Higham's Case* (1586) Godb 40; *Boocher v Samford* (1588) Cro Eliz 113; *Gennings v Lake* (1629) Cro Car 168 at 169 (Crown grant); *Blackborn v Edgley* (1719) 1 P Wms 600 at 603; *Doe d Lempriere v Martin* (1777) 2 Wm Bl 1148 (copyhold land held for a different term); *Ongley v Chambers* (1824) 8 Moore CP 665; *Hobson v Blackburn* (1833) 1 My & K 571 (leaseholds blended in enjoyment with freeholds); *Leach v Leach* [1878] WN 79; *Cuthbert v Robinson* (1882) 51 LJ Ch 238 (charge of legacies and devise to trustees considered material).

In the following cases land was held not to pass under 'appurtenances': *Bettisworth's Case* (1580) 2 Co Rep 31b at 32a; *Yates v Clinard* (1599) Cro Eliz 704 (devise of copyhold house with the appurtenances where the land in question was freehold); *Hearn v Allen* (1627) Cro Car 57; *Smith v Ridgway* (1866) LR 1 Exch 331, Ex Ch. See also *Hill v Grange* (1556) 1 Plowd 164 at 170; *Doe d Renow v Ashley* (1847) 10 QB 663; *Pheysey v Vicary* (1847) 16 M & W 484 at 494 (where a means of access was held on the facts not to be a way of necessity and not to pass under 'land and appurtenances'); *Evans v Angell* (1858) 26 Beav 202; *Lister v Pickford* (1865) 34 Beav 576. In some of these cases it was said that the land would have passed if the words had been 'with the land appertaining'.

3 *Finch v Finch* (1876) 35 LT 235 (where 'appurtenances' of a factory did not include outstanding loans); *Re McCalmont, Rooper v McCalmont* (1903) 19 TLR 490. As to descriptions by locality cf para 576 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/578. 'Business'.

578. 'Business'.

A bequest of a testator's 'business' or of his share in a business¹ prima facie includes his interest in all the assets, including such interest in the land on which it is carried on as forms part of those assets²; but in the context or circumstances it may comprise or exclude various items, such as book debts³, bank balances⁴, the stock in trade⁵ or the land on which it is carried

on⁶, or may be extended to property not part of the assets⁷. A direction to trustees to carry on a business entitles them to carry on business in the premises which the testator was accustomed to use, and a bequest of a business in a suitable context may include the premises where it was carried on⁸. A bequest of goodwill together with specified corporeal assets does not, however, in the absence of a strong indication to the contrary, include freehold premises in which the business is carried on, and a bequest of debts due in respect of the business *prima facie* carries only debts due from trade debtors, and does not include a credit balance in the account of the business at a bank⁹. 'Business' may include a profession¹⁰.

It is a question of construction of the words of the will whether a bequest of a business subjects the legatee to the obligation to discharge the trade liabilities out of the assets¹¹, or is free of such an obligation so that the trade liabilities are borne by the testator's residuary estate¹².

1 See *Re Barfield, Goodman v Child* (1901) 84 LT 28 (where, in the circumstances, undrawn profits were included); *Re Lawes-Wittewronge, Maurice v Bennett* [1915] 1 Ch 408 ('one-fifth share of net profits'; one-fifth of shares included but not one-fifth of debentures also held by testator).

2 *Re Rhagg, Easten v Boyd* [1938] Ch 828, [1938] 3 All ER 314. See also *Rogers v Rogers* (1910) 11 SRNSW 38; *Re White, McCann v Hall* [1958] Ch 762, [1958] 1 All ER 379; *Mandeville v Duncan* 1965 SLT 246, Ct of Sess. As to the power of an executor to carry on the testator's business see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 454 et seq.

3 *Stuart v Marquis of Bute* (1806) 11 Ves 657 (on appeal (1813) 1 Dow 73, HL); *Delany v Delany* (1885) 15 LR Ir 55 (explained in *Re Barfield, Goodman v Child* (1901) 84 LT 28). See also *Re Beard, Simpson v Beard* (1888) 57 LJ Ch 887; *Re Deller's Estate, Warman v Greenwood* [1888] WN 62; *Re Stevens, Stevens v Keily* [1888] WN 110 at 116; *Re Hawkins, Hawkins v Argent* (1913) 109 LT 969.

4 *Re Haigh, Haigh v Haigh* (1907) 51 Sol Jo 343 (not included); *Re Hawkins, Hawkins v Argent* (1913) 109 LT 969 (included); *Re Beecham, Woolley v Beecham* (1919) 63 Sol Jo 430 (included).

5 *Blake v Shaw* (1860) John 732 (gift of 'plant and goodwill'; stock in trade excluded); *Delany v Delany* (1885) 15 LR Ir 55 (stock in trade excluded).

6 *Blake v Shaw* (1860) John 732 (interest in land of no value apart from business); *Re Henton, Henton v Henton* (1882) 30 WR 702 (freehold shop excluded); *Re Hawkins, Hawkins v Argent* (1913) 109 LT 969 (house included).

7 *Bevan v A-G* (1863) 4 Giff 361 (debt of partner included); *Re Barfield, Goodman v Child* (1901) 84 LT 28 (share of capital and undrawn profits included); *Re England, England v Bayles* [1906] VLR 94 ('goodwill' meant provision in articles for testator's family).

8 *Hall v Fennell* (1875) IR 9 Eq 615 at 618; *Devitt v Kearney* (1883) 13 LR Ir 45, Ir CA. See also *Re Martin, Martin v Martin* [1892] WN 120 ('rents and profits' of business). A trustee or personal representative must account for a new lease which he acquires for the purposes of a business bequeathed by the will: *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 45; TRUSTS vol 48 (2007 Reissue) PARA 1109.

9 *Re Betts, Burrell v Betts* [1949] 1 All ER 568.

10 *Re Williams' Will Trusts, Chartered Bank of India, Australia and China v Williams* [1953] Ch 138, [1953] 1 All ER 536 (medical practice). See also PARA 537 note 2 ante.

11 *Re White, McCann v Hull* [1958] Ch 762 at 773, [1958] 1 All ER 379 at 385 per Wynn-Parry J, who held the case was one where the business should be regarded as an entity and the substance of the bequest as the assets of the business subject to its liabilities (applying dicta in *Re Rhagg, Easten v Boyd* [1938] Ch 828 at 836, [1938] 3 All ER 314 at 319).

12 See *Re Timberlake, Archer v Timberlake* (1919) 63 Sol Jo 286; and see the declaration made by Farwell J in *Re Harland-Peck, Hercy v Mayglothing* as cited in [1941] Ch 182 at 183, [1940] 4 All ER 347 at 352, CA. Where a testator's share in real estate forming part of the assets of a partnership is devised by him separately from the rest of his interest in the partnership property, the devisee *prima facie* takes the share free from liability for the partnership debts as between the beneficiaries, if the other partnership property is sufficient to meet the debts: *Re Holland, Bretell v Holland* [1907] 2 Ch 88 (distinguishing *Farquhar v Hadden* (1871) 7 Ch App 1 (where the partnership was insolvent)).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/579. 'Effects', 'personal estate', 'goods' etc.

579. 'Effects', 'personal estate', 'goods' etc.

A gift of the testator's 'effects'¹ without a context sufficient to control it may include the whole of the testator's personal estate where that property is not otherwise disposed of by the will², and is prima facie confined to personal estate³ unless an inference to the contrary arises from the context, in which case even real estate may be comprised in the term⁴. The term may also by the context⁵ be restricted to particular kinds of personal estate⁶. Thus, in a gift of a house with its furniture and a class of articles which tend to the beneficial occupation and enjoyment of the house, ending with 'all other effects', the term may, by the ejusdem generis rule⁷, be restricted to other articles of that nature⁸; and 'effects' is often used in a restricted sense, meaning goods and movables⁹, a sense especially applicable where other parts of the personal estate are separately disposed of¹⁰, or where there is a subsequent residuary gift of personal estate¹¹.

'Personal effects' generally means physical chattels having some personal connection with the testator, such as articles of personal or domestic use or ornament, clothing and furniture, and so forth, but not money or securities for money¹². The expressions 'personal estate', 'personal estate and effects' and 'personal property' are prima facie confined to personal estate in the legal sense¹³, but may, in the context or circumstances, include realty¹⁴. In the case of a testator who dies between 1 January 1926 and 31 December 1996 inclusive, personal property in the legal sense includes, by reason of the doctrine of conversion, land held by trustees subject to a trust for sale, and a share in the proceeds of sale of land held on trust for sale, but does not include, by reason of the doctrine of reconversion, personalty held on trust for sale for investment in land¹⁵. However, in relation to the wills of testators who die on or after 1 January 1997, personal property in the legal sense will not include land held by trustees subject to a trust for sale (except where the trust for sale was created by the will of a testator who died before 1 January 1997), but will include personal property subject to a trust for sale in order that the trustees may acquire land (except where the trust for sale was created by the will of a testator who died before 1 January 1997)¹⁶. Where land is subject to a trust for sale which was created by the will of a testator who died before 1 January 1997, the land or a share in the proceeds of sale of the same will pass under a gift of personal property.

A gift of 'goods' or 'goods and chattels' is prima facie sufficient to include the whole personal estate¹⁷, but may be restricted under the ejusdem generis rule or otherwise¹⁸. 'Belongings' is capable of carrying the whole of the testator's residuary personalty, but is not an apt expression in relation to realty¹⁹, and it may by its context have a more restricted meaning²⁰.

1 For the meaning of 'household effects' see PARA 587 post.

2 *Hodgson v Jex* (1876) 2 ChD 122. See also *Campbell v Prescott* (1808) 15 Ves 500 at 507; *Michell v Michell* (1820) 5 Madd 69 at 71; *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 303; *Malone v Malone* [1925] 1 IR 140, Ir CA ('and effects of every kind'); *Re Fitzpatrick, Deane v De Valera* (1934) 78 Sol Jo 735.

3 *Cave v Cave* (1762) 2 Eden 139; *Camfield v Gilbert* (1803) 3 East 516; *Doe d Hick v Dring* (1814) 2 M & S 448; *Henderson v Farbridge* (1826) 1 Russ 479; *Doe d Haw v Earles* (1846) 15 M & W 450; *Hall v Hall* [1892] 1 Ch 361 at 365, CA, per Lindley LJ (approving *Hawkins on Wills* (1st Edn) 55). See also *Vertannes v Robinson* (1927) LR 54 Ind App 276, PC. Cf *Smyth v Smyth* (1878) 8 ChD 561 at 564-566 (where Malins V-C dissented from *Camfield v Gilbert* supra and *Doe d Hick v Dring* supra).

4 *Hogan v Jackson* (1775) 1 Cowp 299 (devise of residue of testator's 'effects, both real and personal') (affd (1776) 3 Bro Parl Cas 388), followed in *Lord Torrington v Bowman* (1852) 22 LJ Ch 236; *Doe d Chillcott v White*

(1800) 1 East 33 (after devise of goods and land to A, power to give whatever A thought proper of her 'said effects' to B and C); *Marquis of Tichfield v Horncastle* (1838) 2 Jur 610 (effects defined by references elsewhere in the will to 'real estate' and 'property'); *Milsome v Long* (1857) 3 Jur NS 1073 ('stock in trade, money, book debts and effects' carried a reversion in real estate); *Phillips v Beal* (1858) 25 Beav 25 ('devise'); *Hall v Hall* [1892] 1 Ch 361, CA (intention inferred from the words 'devise', 'wheresoever situate', 'property' etc); *Re Wass, Re Clark* (1906) 95 LT 758 (meaning of 'personal estate and effects' affected by charge of debts, use of 'devise' and words of limitation).

5 *Re O'Loughlin* (1870) LR 2 P & D 102.

6 *Gibbs v Lawrence* (1860) 7 Jur NS 137; *Cross v Wilks* (1866) 35 Beav 562; *Watson v Arundel* (1876) IR 10 Eq 299; *Re Hammersley, Heasman v Hammersley* (1899) 81 LT 150.

7 As to the ejusdem generis rule see PARA 541 ante.

8 *Gibbs v Lawrence* (1860) 7 Jur NS 137; *Campbell v M'Grain* (1875) IR 9 Eq 397; *Re Miller, Daniel v Daniel* (1889) 61 LT 365 (banknotes, securities and jewellery not included); *Re Taylor, Barber v Smith* (1919) 147 LT Jo 253 (car not included) (but see note 12 infra); *Re Curling* [1928] IR 521.

9 *Michell v Michell* (1820) 5 Madd 69 at 72 per Leach V-C.

10 *Rawlings v Jennings* (1806) 13 Ves 39 at 46.

11 *MacPhail v Phillips* [1904] 1 IR 155.

12 *Joseph v Phillips* [1934] AC 348, PC. The express inclusion of a desk does not include articles contained in it which are not personal effects, such as pass books and promissory notes: *Joseph v Phillips* supra at 352-353 (distinguishing *Re Robson, Robson v Hamilton* [1891] 2 Ch 559); and see PARA 576 note 14 ante. Prima facie the meaning of 'personal effects' is such that it would include stamp and coin collections and cars: *Re Collin's Will Trusts, Donne v Hewetson* [1971] 1 All ER 283, [1971] 1 WLR 37. In the context, 'personal effects' may extend to the residuary personal estate: *Re Wolfe* [1919] 2 IR 491.

13 *Buchanan v Harrison* (1861) 31 LJ Ch 74; *Belaney v Belaney* (1867) 2 Ch App 138; *Ex p Yates* (1869) 20 LT 940; *Re Cook* [1948] Ch 212, [1948] 1 All ER 231 (where it was assumed that 'personal estate' was used as a term of art). See also PARA 573 note 4 ante. For the meaning of 'estate' see PARA 580 post; and for the meaning of 'real estate' see PARA 582 post. For the meaning of 'personal chattels' see the Administration of Estates Act 1925 s 55(1)(x); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591. In *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618, 'property' in the expression 'income of property actually producing income' was construed as 'property forming part of my estate'.

14 *Doe d Tofield v Tofield* (1809) 11 East 246 at 249 (property over which the testator had an absolute personal power of disposition). See also *Lines v Lines* (1869) 22 LT 400; *Cadman v Cadman* (1872) LR 13 Eq 470 at 474 (freehold rights conferred by navigation shares, if remaining realty, would pass under residuary gift of personal estate); *Re Smalley, Smalley v Smalley* (1883) 49 LT 662; *Re Wass, Re Clarke* (1906) 95 LT 758.

15 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Newman, Slater v Newman* [1930] 2 Ch 409; *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231. As to the doctrines of conversion and reconversion see EQUITY vol 16(2) (Reissue) PARA 701 et seq.

16 See the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. Since 1 January 1997 all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share now has an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

17 *Stuart v Marquis of Bute* (1806) 11 Ves 657 at 666; *Kendall v Kendall* (1828) 4 Russ 360 at 370; *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 303; *Avison v Simpson* (1859) John 43; *Shep Touch* (8th Edn) 447. For the meaning of 'household goods' see PARA 587 post.

18 See *Lamphier v Despard* (1842) 2 Dr & War 59 (residuary gift elsewhere in will); *Manton v Tabois* (1885) 30 ChD 92 at 97.

19 *Re Mills' Will Trusts, Marriott v Mills* [1937] 1 All ER 142; *Re Price, Wasley v Price* [1950] Ch 242, [1950] 1 All ER 338 (explaining *Re Bradfield, Bradfield v Bradfield* [1914] WN 423). Cf *Re Schott's Will Trusts* (1968) 206 Estates Gazette 538 ('belongings' comprised the whole of the testatrix's real and personal estate).

20 *Re Hynes, Knapp v Hynes* [1950] 2 All ER 879, CA (particular gift, not carrying stocks and shares and bank balance).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/580. 'Estate' and 'possessions'.

580. 'Estate' and 'possessions'.

'Estate', as a general description of property¹, is not a technical word², and prima facie, when used in a suitable context, is a very wide term³ being sufficient to include the whole real⁴ and personal⁵ estate. 'Possessions' has a similar meaning⁶.

1 As to the effect of 'estate' in describing the testator's interest cf para 660 note 3 post. For the meaning of 'personal estate' see PARA 579 ante; and for the meaning of 'real estate' see PARA 582 post.

2 *Basset v St Levan* (1894) 13 R 235 at 248, 250.

3 See *Hamilton Corp v Hodsdon* (1847) 6 Moo PCC 76 at 82.

4 *Countess of Bridgwater v Duke of Bolton* (1704) 1 Salk 236; *Churchill v Dibden* (1754) 9 Sim 447n; *Jongsma v Jongsma* (1787) 1 Cox Eq Cas 362 (copyholds); *Midland Counties Rly Co v Oswin* (1844) 1 Coll 74; *Patterson v Huddart* (1853) 17 Beav 210; *Fullerton v Martin* (1853) 22 LJ Ch 893; *O'Toole v Browne* (1854) 3 E & B 572; *Meeds v Wood* (1854) 19 Beav 215; *Hawksworth v Hawksworth* (1858) 27 Beav 1; *Stein v Ritherdon* (1868) 37 LJ Ch 369. See also *Hounsell v Dunning* [1902] 1 Ch 512 at 520-521 (indications that copyholds were not included).

5 As to the effect of the context in confining 'estate' to personal estate see *Marhant v Twisden* (1711) Gilb Ch 30; *Molyneux v Rowe* (1856) 25 LJ Ch 570.

6 *Re Brigden, Chaytor v Edwin* [1938] Ch 205, [1937] 4 All ER 342. It seems that 'all my substance' also has a similar meaning: *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/581. House and buildings.

581. House and buildings.

Words which prima facie describe only a house or other building may, in suitable contexts and circumstances, include land necessary for the convenient use and occupation of it¹. A gift of a house 'and premises' is prima facie sufficient to include such land² and the appurtenances of the house³. Even other land commonly enjoyed with the house may be included in such a description⁴. A gift of a house prima facie includes chattels affixed to and used for the decoration or convenience of the house⁵.

1 Co Litt 5b (garden and curtilage); *Smith v Martin* (1672) 2 Wms Saund 394; *Smith v Ridgway* (1866) LR 1 Exch 331 at 333-334, Ex Ch ('land so intimately connected with the use of the building that without it the building would be useless'). See also *Lombe v Stoughton* (1849) 18 LJ Ch 400; *Brown v Brown* (1901) 1 SRNSW Eq 218. Cf the meaning of 'house' in the Lands Clauses Consolidation Act 1845 s 92: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 626.

2 *Lethbridge v Lethbridge* (1862) 4 De GF & J 35; *Re Willis, Spencer v Willis* [1911] 2 Ch 563 at 569.

3 *Re Seal, Seal v Taylor* [1894] 1 Ch 316 at 320, CA. See also *Read v Read* (1866) 15 WR 165.

4 *Blackborn v Edgley* (1719) 1 P Wms 600 at 603; *Gulliver d Jefferies v Poyntz* (1770) 2 Wm Bl 726; *Doe d Clements v Collins* (1788) 2 Term Rep 498; *Doe d Hemming v Willetts* (1849) 7 CB 709; *Ross v Veal* (1855) 1 Jur NS 751; *Hibon v Hibon* (1863) 9 Jur NS 511 (the gifts, in the last three cases cited, were of a 'house and premises'); *Mocatta v Mocatta* (1883) 49 LT 629; *Re Willis, Spencer v Willis* [1911] 2 Ch 563; *Re Fuller, Arnold v Chandler* (1915) 59 Sol Jo 304 (gift of a house and land, described as 'now in the occupation of' R, held to include separate land leased to R before the making of the will); *Barclays Bank Ltd v Zeitline* (1962) 182 Estates Gazette 291 (gift of home included garage and flat at rear of garden of house held on lease separate from but identical to lease of house). See also *Heach v Prichard* [1882] WN 140.

5 *Re Whaley, Whaley v Roehrich* [1908] 1 Ch 615.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/582. Devise of land and other general devises.

582. Devise of land and other general devises.

A devise of the testator's land¹, or of the testator's land in any place² or in the occupation of any person mentioned in the will, or otherwise described in a general manner, and any other general devise³ which would describe a leasehold estate if the testator had no freehold estate which could be described by it, must be construed to include his leasehold estates, or such of those estates or any of them to which such description extends, as the case may be, as well as freehold estates, unless a contrary intention appears by the will⁴.

A devise of 'real estate'⁵ may be such a general devise as is mentioned above⁶, but is more readily given its technical meaning and will not generally pass leaseholds⁷, although it may do so where there is no real estate⁸, or where the special circumstances or the context so require⁹. Similarly, 'lands and tenements'¹⁰, although prima facie meaning real estate, will pass leaseholds if there is no real estate¹¹, or if the intention to include leaseholds is clear¹².

A gift of land in a named place is capable of including incorporeal hereditaments, such as an advowson in gross¹³, tithes¹⁴ and tithe rentcharges¹⁵, issuing out of land in that locality. A gift of land passes growing crops¹⁶, unless the will shows a contrary intention¹⁷.

In the case of a testator who dies between 1 January 1926 and 31 December 1996 inclusive, a gift of land or real estate would not include land held on trust for sale or a share in the proceeds of sale of such land by reason of the doctrine of conversion¹⁸, unless there is nothing else the testator could have intended¹⁹. However, on and after 1 January 1997 the doctrine of conversion has been abolished in respect of all trusts for sale whenever created or arising, except where the trust for sale was created by the will of a testator who died before 1 January 1997²⁰, so that a gift of land or real estate in the will of a testator who dies on or after 1 January 1997 will now pass land held by trustees subject to a trust for sale (except where the trust for sale was created by the will of a testator who died before 1 January 1997), or an undivided share in the proceeds of sale of land held on trust for sale (except where the trust for sale was created by the will of a testator who died before 1 January 1997); and it will also pass an undivided share in land which is not subject to a trust for sale²¹. Where land is subject to a trust for sale which was created by the will of a testator who died before 1 January 1997, the doctrine of conversion still applies so that such land or a share in the proceeds of sale of the same will not pass under a gift of land.

Formerly, money held on trust for investment in land, as to which no effective election to reconvert the property had been made²², would ordinarily be included under a description of 'land' or 'real estate' generally²³. However, the doctrine of reconversion whereby personal property subject to a trust for sale in order that the trustees may acquire land is to be regarded as land has been abolished in respect of all trusts for sale whenever created or arising, except

where the trust for sale was created by the will of a testator who died before 1 January 1997²⁴, so that personal property which is held on trust for sale in order that the trustees may acquire land will not pass under a gift of land or real estate in the will of a testator who dies on or after 1 January 1997 (except where the trust for sale was created by the will of a testator who died before 1 January 1997). Where personal property is subject to a trust for sale which was created by the will of a testator who died before 1 January 1997 in order that the trustees may acquire land, the doctrine of reconversion still applies so that such property should pass under a gift of land.

A gift of a house of which the testator is described as the owner and occupier is satisfied if the testator is the owner and the house is kept ready for his occupation, even though the testator is not himself actually resident there²⁵.

1 In wills made before the Wills Act 1837, a devise of 'land' prima facie did not include leaseholds where there were freehold estates as to which the gift could be operative: *Rose v Bartlett* (1633) Cro Car 292 ('land and tenements'); *Davis v Gibbs* (1730) 3 P Wms 26; *Chapman v Hart* (1749) 1 Ves Sen 271; *Thompson v Lady Lawley* (1800) 2 Bos & P 303; *Swift v Swift* (1859) 1 De GF & J 160 at 170-171. Leaseholds, however, might pass under the gift, either if there were no freeholds for the gift to operate upon, or if the will showed such an intention: *Day v Trig* (1715) 1 P Wms 286; *Hartley v Hurle* (1800) 5 Ves 540; *Goodman v Edwards* (1833) 2 My & K 759; *Gully v Davis* (1870) LR 10 Eq 562. The object of the Wills Act 1837 was to shift the burden of proof to the persons who deny that in a will 'land' is meant to include leasehold estates in land: *Prescott v Barker* (1874) 9 Ch App 174 at 186.

2 *Wilson v Eden* (1850) 5 Exch 752; on appeal (1852) 16 Beav 153 (land 'at or near' W; a case where the Court of Chancery concurred with the opinions of the courts of common law whose opinions had been taken).

3 As to the purport of this phrase see *Butler v Butler* (1884) 28 ChD 66 at 72.

4 Wills Act 1837 s 26 (amended by the Statute Law (Repeals) Act 1969). See *Wilson v Eden* (1850) 5 Exch 752 (on appeal (1852) 16 Beav 153) (no restriction by addition of 'all other my real estate in the country of D'; nor by the fact that limitations were adapted to real estate only); *Prescott v Barker* (1874) 9 Ch App 174 (provisions of will inconsistent with leaseholds being included). A contrary intention may be shown, eg in a suitable context, by another gift of 'all my leasehold estate' (see *Re Guyton and Rosenberg's Contract* [1901] 2 Ch 591), or of 'all my personal estate wheresoever situated' (*Butler v Butler* (1884) 28 ChD 66); but not by a mere gift of personal estate simply, or by a specific bequest of a specified leasehold (*Re Davison, Greenwell v Davison* (1888) 58 LT 304).

5 As to the technical meaning of 'real estate', apart from the Wills Act 1837 s 26 (as amended) or a controlling context see REAL PROPERTY vol 39(2) (Reissue) PARA 2. In *Evans v Evans* (1849) 17 Sim 86, a special meaning was given to the term, and certain tithes were excluded. See also PARA 573 note 3 ante.

6 *Moase v White* (1876) 3 ChD 763, commented on in *Butler v Butler* (1884) 28 ChD 66 at 75; *Re Davison, Greenwell v Davison* (1888) 58 LT 304; *Re Uttermare, Leeson v Foulis* [1893] WN 158. See also *Hester v Trustees, Executors and Agency Co Ltd* (1892) 18 VLR 509. For the meaning of 'estate' see PARA 580 ante. For the meaning of 'personal estate' see PARA 579 ante; and see PARA 573 note 4 ante.

7 See *Butler v Butler* (1884) 28 ChD 66; *Prescott v Barker* (1874) 9 Ch App 174 (applicability of limitations to real estate only). See also *Smith v Baker* (1737) 1 Atk 385 at 386; *Parker v Marchant* (1843) 5 Man & G 498; *Turner v Turner* (1852) 21 LJ Ch 843 (where leasehold ground rents were not included); *Holmes v Milward* (1878) 47 LJ Ch 522.

8 *Re Holt, Holt v Holt* [1921] 2 Ch 17 (where it was held, distinguishing *Butler v Butler* (1884) 28 ChD 66, that the case was not within the Wills Act 1837 s 26; and the principle of *Rose v Bartlett* (1633) Cro Car 292 was applied). See also *Gully v Davis* (1870) LR 10 Eq 562.

9 See *Swift v Swift* (1859) 1 De GF & J 160; *Mathews v Mathews* (1867) LR 4 Eq 278; *Re Guyton and Rosenberg's Contract* [1901] 2 Ch 591 (devise of real estate passed testator's freehold and leasehold interests in the same land).

10 According to 2 Jarman on Wills (8th Edn) 1270, 'tenements' and 'hereditaments' include all real estate.

11 *Rose v Bartlett* (1633) Cro Car 292 at 293.

12 *Swift v Swift* (1859) 1 De GF & J 160.

13 *Re Hodgson, Taylor v Hodgson* [1898] 2 Ch 545. Cf, however, *Westfaling v Westfaling* (1746) 3 Atk 460 at 464; *Crompton v Jarratt* (1885) 30 ChD 298.

14 *Inchley v Robinson* (1587) 3 Leon 165.

15 *Re Lory's Will Trusts, Lambrick v Public Trustee of the Colony and Protectorate of Kenya* [1950] 1 All ER 349; but cf *West v Lawday* (1865) 11 HL Cas 375 at 386-387. As to the commutation of tithes and the general extinguishment of tithe rentcharge see ECCLESIASTICAL LAW vol 14 paras 1212-1215.

16 *Spencer's Case* (1622) Win 51.

17 A bequest of 'stock' passes growing crops as against the devisee of the land: see *Blake v Gibbs* (1825) 5 Russ 13n; *Rudge v Winnall* (1849) 12 Beav 357. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 349. It seems that a contrary intention is not shown by a mere residuary bequest of personalty: *Cooper v Woolfitt* (1857) 2 H & N 122.

18 *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, CA; *Re Newman, Slater v Newman* [1930] 2 Ch 409; *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231. As to the doctrines of conversion and reconversion see EQUITY vol 16(2) (Reissue) PARA 701 et seq.

19 *Re Lowman, Devenish v Pester* [1895] 2 Ch 348, CA (a gift of 'land' passed the testator's share of the proceeds of sale of land); *Re Glassington, Glassington v Follett* [1906] 2 Ch 305 (a gift of 'real estate' passed the testator's share of the proceeds of sale of land).

20 See the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is, however, not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land.

21 On or after 1 January 1997, an undivided share in land need not subsist behind a trust for sale: see *ibid* ss 1-5; and REAL PROPERTY vol 39(2) (Reissue) PARA 64 et seq. The statutory trusts imposed by the Law of Property Act 1925 ss 34, 36 (as amended) and the Administration of Estates Act 1925 s 33 (as amended) are no longer trusts for sale but trusts of land (without a duty to sell): see the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

22 See EQUITY vol 16(2) (Reissue) PARAS 718-723.

23 See EQUITY vol 16(2) (Reissue) PARA 706.

24 See the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5). The doctrine is, however, not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the purchase of land.

25 *Re Garland, Eve v Garland* [1934] Ch 620. Cf *Re Powell, Public Trustee v Bailey* (1982) 31 SASR 361, 5 Aust (where the gift of a residence forming the testatrix's principal place of abode at the time of her death was held to refer to her residence before she was admitted as a patient to the mental hospital where she died).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/583. 'Living' of church.

583. 'Living' of church.

A gift of the 'living' of a certain church is ambiguous; it is sufficient to pass the advowson, but may be restricted to a single presentation, as where the will shows an intention that the devisee should have a benefit personal to himself and should himself be presented¹.

¹ *Webb v Byng* (1856) 2 K & J 669 at 674 per Wood V-C; on appeal 8 De GM & G 633 (where the decision of the Vice-Chancellor was obiter, as on appeal it was held that he had no jurisdiction for want of parties). As to the modern restrictions on the transfer of advowsons see ECCLESIASTICAL LAW vol 14 para 802 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/584. 'Money'.

584. 'Money'.

'Money' in a will has no strict technical meaning¹. It was formerly construed strictly as comprehending only cash under the testator's immediate control unless there was a context to extend its meaning, but it has been judicially recognised that it is a word which in popular usage has a diversity of meanings, and the rule now is that, in construing any particular will, the court must determine the meaning attached to the word by the testator without any presumption that it bears any one of its possible meanings². 'Money' ordinarily includes cash and notes in hand³, money immediately payable to the testator at call⁴ and money at a bank on current or deposit account⁵. It may include money in the hands of trustees awaiting investment⁶, and investments readily able to be turned into money⁷; it may also include the whole of the testator's personal estate⁸, and even his real estate⁹. The fact that a specific gift comes after the gift in question may, however, prevent it from being residuary, but it is not conclusive against its being a residuary gift¹⁰, and the fact that there is a residuary gift elsewhere in the will may rebut the inference that a gift of money is of a residuary nature¹¹. 'Money' has in particular received a wide meaning where the court has been influenced by the presumption against intestacy¹².

Qualifying words may necessitate a stricter construction; thus 'ready money', in its ordinary sense, includes money on current account at a bank¹³ or in the hands of an agent acting as banker¹⁴, and money on deposit account at a bank where no notice of withdrawal is required¹⁵; but it does not ordinarily include money on deposit account where a substantial¹⁶ previous notice of withdrawal is required¹⁷ according to the usual course of business¹⁸, or other choses (or things) in action generally¹⁹. Similarly, the use of the word 'cash' may have a restrictive effect²⁰. 'Cash at my bankers' includes money on deposit, if that money is payable on demand, but not otherwise²¹. A wide construction is, however, permitted by the use of such terms as 'money due and owing'²², and by the description of money by its investment situation²³.

A gift of money invested in various stocks, if a gift of the particular investments mentioned, is deemed on a subsequent change of investment by the testator into stocks not coming within the description²⁴. The ordinary meaning of 'investments', unaffected by any context, does not include money on deposit at a bank²⁵; conversely, a gift of a bank deposit does not carry investments held for the testator by the bank²⁶.

1 *Re Cadogan, Cadogan v Palagi* (1883) 25 ChD 154 at 157 per Kay J. Its meaning is flexible: *Re Townley, Townley v Townley* (1884) 50 LT 394 at 396 per Pearson J.

2 *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL (where the earlier cases to the contrary were disapproved by the majority, but Lord Russell of Killowen (and, it seems, Lord Romer) thought that the old rule was right but had been misapplied); *Re Barnes' Will Trusts, Prior v Barnes* [1972] 2 All ER 639, [1972] 1 WLR 587. Where property not falling within the strict meaning of money is excepted from a gift of money, this is a reason for extending the meaning: *Re White* (1882) 7 PD 65; *Re Buller, Buller v Giberne* (1896) 74 LT 406.

3 *Downing v Townsend* (1755) Amb 280 at 281; *Barrett v White* (1855) 1 Jur NS 652 at 653; *Re Windsor, Public Trustee v Windsor* (1913) 108 LT 947 (where money orders were treated as 'cash').

4 *Byrom v Brandreth* (1873) LR 16 Eq 475 at 479; *Re Friedman, Friedman v Friedman* (1908) 8 SRNSW 127.

5 *Manning v Purcell* (1855) 7 De GM & G 55 at 64, 67 (followed in *Re Collings, Jones v Collings* [1933] Ch 920); *Harper's Trustee v Bain* (1903) 5 F 716 (money on deposit for four years included in 'moneys . . . in any . . . banks'); *Re Glendinning, Steel v Glendinning* (1918) 88 LJ Ch 87 ('all my moneys at the bank'); *Perrin v Morgan* [1943] AC 399 at 421, [1943] 1 All ER 187 at 198, HL, per Lord Romer; *Re Trundle, Emanuel v Trundle* [1961] 1 All ER 103, [1960] 1 WLR 1388. Cf *Masson v Smellie* (1903) 6 F 148 (where 'money in banks' did not pass an unpaid legacy which was in fact in a bank); *Re Boorer, Boorer v Boorer* [1908] WN 189 ('cash at

bankers'); *Re Lowe's Estate, Swann v Rockley* [1938] 2 All ER 774 (where money in which the testator had an interest, but which stood to an account over which he had no control, did not pass); *Re Stonham, Lloyds Bank Ltd v Maynard* [1963] 1 All ER 377, [1963] 1 WLR 238 (where 'cash in X Bank' was in the context held to include money on both current and deposit accounts). 'Money on my current account' may pass money on deposit account, where the testator has never had a current account (*Re Vear, Vear v Vear* (1917) 62 Sol Jo 159), but money 'to my account' has been held to mean money on current account, and not to include money in the hands of trustees (*Re Bradfield, Bradfield v Bradfield* [1914] WN 423).

6 *Ogle v Knipe* (1869) LR 8 Eq 434.

7 Eg stock was included in 'money' in the wills considered in *Lynn v Kerridge* (1737) West temp Hard 172; *Waite v Combes* (1852) 5 De G & Sm 676; *Newman v Newman* (1858) 26 Beav 218; *Chapman v Reynolds* (1860) 28 Beav 221 (where the fact that the state of the property of the testatrix rendered it impossible that after payment of debts the bequest could have anything except government stock to operate on was considered a reason for extending the meaning); *Hart v Hernandez* (1885) 52 LT 217; *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302 at 303; *Re Adkins, Solomon v Catchpole* (1908) 98 LT 667 (consols). Shares were included in *Re Dutton, Herbert v Harrison* (1869) 20 LT 386. In *Lloyd v Lloyd* (1886) 54 LT 841, rents and a bond which would naturally come to the executors as money passed. In *O'Connor v O'Connor* [1911] 1 IR 263, mortgages not able to be called in were excluded. Where the gift is of money after payment of debts or legacies, or both debts and legacies, either generally out of the estate or out of certain property, the gift is often construed as ejusdem generis with that made subject to the payment, and for this reason may pass the residuary personal estate: *Dicks v Lambert* (1799) 4 Ves 725; *Kendall v Kendall* (1828) 4 Russ 360; *Rogers v Thomas* (1837) 2 Keen 8; *Dowson v Gaskoin* (1837) 2 Keen 14; *Barrett v White* (1855) 1 Jur NS 652; *Grosvenor v Durston* (1858) 25 Beav 97 at 99; *Langdale v Whitfield* (1858) 4 K & J 426 at 436; *Stocks v Barre* (1859) John 54; *Re Egan, Mills v Penton* [1899] 1 Ch 688.

8 *Perrin v Morgan* [1943] AC 399 at 407, [1943] 1 All ER 187 at 190, HL, per Viscount Simon LC, and at 421-422 and 198 per Lord Romer. See also *Legge v Asgill* (1818) Turn & R 265n; *Dowson v Gaskoin* (1837) 2 Keen 14; *Cowling v Cowling* (1859) 26 Beav 449 at 451 per Romilly MR; *Montagu v Earl of Sandwich* (1863) 33 Beav 324; *Re Pringle, Walker v Stewart* (1881) 17 ChD 819; *Re Cadogan, Cadogan v Palagi* (1883) 25 ChD 154; *Re Maclean, Williams v Nelson* (1894) 11 TLR 82; *Re Bramley* [1902] P 106; *Re Skillen, Charles v Charles* [1916] 1 Ch 518; *Re Woolley, Cathcart v Eyskens* [1918] 1 Ch 33 (reversionary interest under settlement); *Re Recknell, White v Carter* [1936] 2 All ER 36 (effect of 'all'); *Re Gammon, Shelton v Williams* [1986] CLY 3547 ('remainder of money'). In *Re Townley, Townley v Townley* (1884) 50 LT 394, personal estate except household furniture and effects passed. In *Prichard v Prichard* (1870) LR 11 Eq 232, the testator had little money, strictly so called, but large personal estate and some freehold property; and the whole of the personal estate, including leaseholds, passed, but not the freehold property.

9 *Perrin v Morgan* [1943] AC 399 at 407, [1943] 1 All ER 187 at 190, HL, per Viscount Simon LC; *Re Gammon, Shelton v Williams* [1986] CLY 3547 ('remainder of money'). Cf *Re Tribe, Tribe v Truro Cathedral (Dean and Chapter)* (1915) 85 LJ Ch 79; and as to the effect of 'all' see *Re Jennings, Caldbeck v Stafford and Lindemere* [1930] 1 IR 196 at 206. In view of the present liability by statute of real and personal estate for payment of debts (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 416-423), it may be that 'the remainder of any moneys' after payment of debts will carry residuary property, both real and personal: *Re Mellor, Porter v Hindsley* [1929] 1 Ch 446; *Re Shaw, Mountain v Mountain* [1929] WN 246. Cf *Re Emerson, Morrill v Nutty* [1929] 1 Ch 128 (where 'residue of money at the time of my death' carried the residuary general estate, but not freehold ground rents). In *Stooke v Stooke* (1866) 35 Beav 396 at 397, Romilly MR gave an instance where he considered that realty would be comprised. See also *Ferman v Ryan* [1912] QSR 145. In *Prichard v Prichard* (1870) LR 11 Eq 232 at 235, Malins V-C said the words in that case could not be extended to the real estate, because of the favour shown to the heir-at-law; but see PARA 553 ante.

10 See *Re Pringle, Walker v Stewart* (1881) 17 ChD 819 at 823; *Re Townley, Townley v Townley* (1884) 50 LT 394; *Re Maclean, Williams v Nelson* (1894) 11 TLR 82.

11 *Willis v Plaskett* (1841) 4 Beav 208 at 210; *Williams v Williams* (1878) 8 ChD 789, CA; *Re Mann, Ford v Ward* [1912] 1 Ch 388 at 391 (distinguishing *Re Adkins, Solomon v Catchpole* (1908) 98 LT 667). In *Re Capel, Arbuthnot v Capel* (1914) 59 Sol Jo 177, however, 'the rest of my money' passed a reversionary interest in personalty, even though there was a further gift in form residuary.

12 See *Lowe v Thomas* (1854) Kay 369 at 377 per Wood V-C (on appeal 5 De GM & G 315); *Boardman v Stanley* (1873) 21 WR 644; *Re Cadogan, Cadogan v Palagi* (1883) 25 ChD 154 at 157 per Kay J.

13 *Taylor v Taylor* (1837) 1 Jur 401; *Fryer v Ranken* (1840) 11 Sim 55; *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 305-306 (on appeal (1843) 1 Ph 356); *Re Powell's Trust* (1858) John 49.

14 *Fryer v Ranken* (1840) 11 Sim 55.

15 *Stein v Ritherdon* (1868) 37 LJ Ch 369; *Mayne v Mayne* [1897] 1 IR 324.

16 The opinion has been expressed that, if money on deposit with bankers is subject to more than 24 hours' notice of withdrawal, it is not ready money: *Re Price, Price v Newton* [1905] 2 Ch 55 at 56 per Farwell J.

17 *Mayne v Mayne* [1897] 1 IR 324 (seven or ten days); *Re Wheeler, Hankinson v Hayter* [1904] 2 Ch 66 (14 days).

18 The waiver, by the bank, of the notice required does not make money so deposited 'ready money' (*Mayne v Mayne* [1897] 1 IR 324), unless it is the usual course of business (*Re Rodmell, Safford v Safford* (1913) 108 LT 184). A mere power to require notice for money, according to practice payable on demand, does not, however, prevent money deposited from being ready money: *Re Cosgrove's Estate, Willis v Goddard* (1909) Times, 3 April. A common practice of waiver on terms was not considered sufficient in *Re Friedman, Friedman v Friedman* (1908) 8 SRNSW 127.

19 Eg a sum due on note of hand (*Re Powell's Trust* (1858) John 49); money in the hands of an agent not acting as banker (*Smith v Butler* (1846) 3 Jo & Lat 565; *Cooke v Wagster* (1854) 2 Sm & G 296 at 300 (where, however, the sum in question passed as 'money' generally)); the apportioned parts of unreceived rent, dividends, interest or pension (*Fryer v Ranken* (1840) 11 Sim 55; *May v Grave* (1849) 3 De G & Sm 462; *Stein v Ritherdon* (1868) 37 LJ Ch 369); government or other stock (*Enohin v Wylie* (1862) 10 HL Cas 1; *Bevan v Bevan* (1880) 5 LR Ir 57, Ir CA); or a share of another testator's residue (*Re Andrews, Andrews v O'Mara* (1899) 25 VLR 408). See generally CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

20 *Beales v Crisford* (1843) 13 Sim 592 (gift of residue 'all but cash or moneys so called'; promissory notes, bonds and long annuities held not to be within the exception); *Nevinson v Lady Lennard* (1865) 34 Beav 487 ('money . . . if any such cash be remaining').

21 See *Re Boorer, Boorer v Boorer* [1908] WN 189, which was stated to lay down no general rule, and not followed, in *Re Stonham, Lloyds Bank Ltd v Maynard* [1963] 1 All ER 377, [1963] 1 WLR 238 (where in the context of the will as a whole 'cash in X Bank' was held to pass money in a deposit as well as in a current account). A sum in the National Savings Bank which cannot, except as to small sums, be withdrawn without notice is not cash: *Re Ashworth, Bent v Thomas* (1942) 86 Sol Jo 134.

22 *Bide v Harrison* (1873) LR 17 Eq 76 (damages on claim enforced by executors). Money received after the testator's death on claims which did not at the testator's death constitute debts (*Stephenson v Dowson* (1840) 3 Beav 342 (freight not yet earned); *Collins v Doyle* (1826) 1 Russ 135; *Martin v Hobson* (1873) 8 Ch App 401), and the apportioned parts, for the testator's lifetime, of dividends not declared until after his death (*Re Burke, Wood v Taylor* [1914] 1 IR 81), have been held not to pass under such words as 'money due or owing'. 'Money due and owing' or 'money owing' may include, as a rule, any sums payable at a future date or on a future contingency: *Brown v Brown* (1858) 6 WR 613 at 614 per Wood V-C (money raisable on request; money left at bank until called for); *Petty v Willson* (1869) 4 Ch App 574 (money receivable by executors under a policy of assurance); *Re Derbyshire, Webb v Derbyshire* [1906] 1 Ch 135 (money on deposit at bank there included, whether notice of withdrawal was required or not; the presumption against intestacy was applied).

23 *Gallini v Noble* (1810) 3 Mer 691 ('money in the Bank of England', testator having no account there); *Reilly v Stoney* (1865) 16 I Ch R 295 ('in the Bank of' I); *Stooke v Stooke* (1866) 35 Beav 396 ('in whatever it may be, in bonds or consols or anything else'); *Wilkes v Collin* (1869) LR 8 Eq 338 ('in real securities'). See also *Brennan v Brennan* (1868) IR 2 Eq 321 ('in the Bank of' I); *Sealy v Stawell* (1868) IR 2 Eq 326 ('in my drawer'); *Re Pringle, Walker v Stewart* (1881) 17 ChD 819 ('however invested'); *Re Harding, Drew v St Thomas' Hospital* (1910) 27 TLR 102 ('moneys invested in any banks or institutions' included consols). Cf *Langdale v Whitfeld* (1858) 4 K & J 426 (money, of or to which the testatrix might be 'possessed or entitled', included money due); *Vaisey v Reynolds* (1828) 5 Russ 12 ('moneys in hand', being contrasted with money out at interest on security, included money due); *Howell v Gayler* (1842) 5 Beav 157 ('money I may have' in books of the bank did not include stock in names of trustees); *Loring v Thomas* (1861) 5 LT 269; *Re Saxby, Saxby v Kiddell* [1890] WN 171 (money in savings bank); *Re Glendinning, Steel v Glendinning* (1918) 88 LJ Ch 87 ('moneys at the bank'); and see *Re Butler, Le Bas v Herbert* [1894] 3 Ch 250 at 251. As to 'money in the funds' see PARA 586 post.

24 *Harrison v Jackson* (1877) 7 ChD 339; *Re Sayer, McClellan v Clark* (1884) 50 LT 616; *Re Robe, Slade v Walpole* (1889) 61 LT 497; *Re Slater, Slater v Slater* [1907] 1 Ch 665, CA. Where, however, a testator describes property with reference to the source from which he received it, no ademption results from change of investment: *Morgan v Thomas* (1877) 6 ChD 176.

25 *Re Price, Price v Newton* [1905] 2 Ch 55. See also *Archibald v Hartley* (1852) 21 LJ Ch 399; *Re Sudlow, Smith v Sudlow* [1914] WN 424 (money on deposit with employer not 'invested'); but cf *Re Lewis' Will Trusts, O'Sullivan v Robbins* [1937] Ch 118, [1937] 1 All ER 227.

26 *Re Heilbronner, Nathan v Kenny* [1953] 2 All ER 1016, [1953] 1 WLR 1254.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/585. 'Securities'.

585. 'Securities'.

According to its literal meaning, 'securities' includes such money as is secured either on property¹ or on personal security² (including even promissory notes³ and bills of exchange⁴), and any stock or other investment which, by the terms of its creation, is a security for the payment of money⁵; but it does not include money for which a mere acknowledgment of indebtedness has been given⁶, or the ordinary description of stock and shares in a public company⁷. 'Securities' is, however, very commonly used as a synonym for investments, or property dealt with on the Stock Exchange, and this meaning may readily be attributed to the word⁸; and generally other meanings may be given to it, according to the context of the will and the circumstances of the case⁹.

1 *Cust v Goring* (1854) 18 Beav 383 (Scottish heritable bond); *Ogle v Knipe* (1869) LR 8 Eq 434 (mortgage). Cf *Robinson v Robinson* (1851) 1 De GM & G 247 at 262 (turnpike bonds). A vendor's lien was not considered a security in *Goold v Teague* (1858) 5 Jur NS 116, but the case was doubted and distinguished in *Callow v Callow* (1889) 42 ChD 550, following the observations in Sugden's Vendors and Purchasers (14th Edn) 684 and Dart's Vendors and Purchasers (6th Edn) 827. As to gifts of mortgages see MORTGAGE vol 77 (2010) PARA 388.

2 Eg a bond (*Bacchus v Gilbee* (1863) 3 De GJ & Sm 577; *Re Beavan, Beavan v Beavan* (1885) 53 LT 245 at 247 per Kay J) or policy of assurance (*Lawrance v Galsworthy* (1857) 3 Jur NS 1049); but see *Re Lilly's Will Trusts, Public Trustee v Johnstone* [1948] 2 All ER 906 (where policy money was excluded).

3 *Re Beavan, Beavan v Beavan* (1885) 53 LT 245; but see *Stiles v Guy* (1832) 4 Y & C Ex 571 (promissory note would not be security for purposes of direction to trustees to invest in approved securities).

4 *Barry v Harding* (1844) 1 Jo & Lat 475 at 483 per Sugden LC; but see *Southcot v Watson* (1745) 3 Atk 226 at 232 (banknotes).

5 *Bescoby v Pack* (1823) 1 Sim & St 500 (stock in public funds); *Turner v Turner* (1852) 21 LJ Ch 843 (consols, but not insurance company's shares); *Re Beavan, Beavan v Beavan* (1885) 53 LT 245 (consols and railway debenture stocks). Cf *Hudleston v Gouldsbury* (1847) 10 Beav 547 (shares in canal company not security for money).

6 *Vaisey v Reynolds* (1828) 5 Russ 12 (money at bank); *Barry v Harding* (1844) 1 Jo & Lat 475 (IOU); *Hopkins v Abbott* (1875) LR 19 Eq 222 (banker's deposit notes); *Re Beavan, Beavan v Beavan* (1885) 53 LT 245 at 247 per Kay J (IOUs). See also *Re Mason's Will* (1865) 34 Beav 494 (legacy).

7 *Harris v Harris* (1861) 29 Beav 107; *Ogle v Knipe* (1869) LR 8 Eq 434 (bank stock); *M'Donnell v Morrow* (1889) 23 LR Ir 591 (shares in companies); *Re Kavanagh, Murphy v Doyle* (1892) 29 LR Ir 333, Ir CA (partly paid bank shares excluded from trustee investment clause); *Re Maitland, Chitty v Maitland* (1896) 74 LT 274; *Re Smithers, Watts v Smithers* [1939] Ch 1015, [1939] 3 All ER 689. See also *Re Hutchinson, Crispin v Hadden* (1919) 88 LJ Ch 352.

8 *Dicks v Lambert* (1799) 4 Ves 725; *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, CA. See also *Re Johnson, Greenwood v Greenwood* (1903) 89 LT 520, CA; *Re Mort, Perpetual Trustee Co Ltd v Bisdee* (1904) 4 SRNSW 760; *Re J H* (1911) 25 OLR 132; *Re Scorer, Burt v Harrison* (1924) 94 LJ Ch 196. A bequest of 'all money, shares and securities at my bankers' does not pass stocks of which only stock receipts and inscription receipts are at the bank: *Re Hay Drummond, Halsey v Pechell* (1922) 128 LT 621. As to the Stock Exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 75.

9 *Dicks v Lambert* (1799) 4 Ves 725 (stock included); *Re Gent and Eason's Contract* [1905] 1 Ch 386 (where power to vary securities included power to sell real estate); *Re Douglas's Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 2 All ER 620, [1959] 1 WLR 744 (affd on another point [1959] 3 All ER 785, [1959] 1 WLR 1212, CA) (where 'power to invest in securities' was held to include stocks or shares or bonds). For the meaning of 'securities standing in any name' see *Re Mayne, Stoneham v Woods* [1914] 2 Ch 115.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/586. 'Stocks and shares', 'funds', 'war loan' etc.

586. 'Stocks and shares', 'funds', 'war loan' etc.

The natural meaning of 'stocks and shares' is stocks and shares of limited companies¹. A bequest of 'shares' in a particular company may pass the testator's stock in that company which is of the same nature as, and identical with, shares², but prima facie³ not stock issued as security, such as debentures or debenture stock⁴. For the purposes of an investment clause, 'stock' may include shares⁵.

'The funds', standing alone and without a context, has been held to mean the funds established by various Acts of Parliament and forming part of the National Debt of the United Kingdom⁶. Where in a will words of description refer to the funds, as in the case of 'funded property', 'money in the funds' and like expressions, prima facie the reference is to such public funds⁷, but the context and the circumstances may require a different construction⁸.

'War loan' has been held to apply to any security created for the purpose of the 1914-18 war⁹. 'War bonds' has been held not to include war stock¹⁰.

1 *Re Everett, Prince v Hunt* [1944] Ch 176, [1944] 2 All ER 19. In *Re Purnchard's Will Trusts, Public Trustee v Pelly* [1948] Ch 312, [1948] 1 All ER 790, the phrase was given a wide meaning, there being no residuary gift.

2 *Morrice v Aylmer* (1875) LR 7 HL 717 (overruling *Oakes v Oakes* (1852) 9 Hare 666). Stock issued on a reconstruction of a company may pass under a gift of 'all my shares', but not debentures: *Re Humphreys, Wren v Ward* (1915) 114 LT 230. A bequest of 'my shares in different securities' does not carry an interest which the testator has as next of kin in shares and stock forming part of the unadministered estate of an intestate: *Re Holmes, Villiers v Holmes* [1917] 1 IR 165. But see *Re Leigh's Will Trusts* [1970] Ch 277, [1969] 3 All ER 432, where a bequest of 'all shares which I hold and any other interest or assets which I may have in S Ltd' passed shares in S Ltd and a debt due from S Ltd which formed part of the testatrix's husband's unadministered estate. As to a gift of shares including 'current dividends' see *Re Raven, Spencer v Raven* (1914) 111 LT 938; and as to the apportionment of dividend on cumulative preference shares see *Re Wakley, Wakley v Vachell* [1920] 2 Ch 205, CA. Whether bonus shares will pass to a life tenant under a gift of 'dividends, bonuses and income' depends on whether they are issued as capital or income: *Re Speir, Holt v Speir* [1924] 1 Ch 359, CA. In *Re Quibell's Will Trusts, White v Reichert* [1956] 3 All ER 679, [1957] 1 WLR 186, a bequest of shares in a company to be formed after the testator's death carried shares in the company, even though it was in fact formed by the testator in his lifetime.

3 See, however, *Re Weeding, Armstrong v Wilkin* [1896] 2 Ch 364 (where the testator had no shares).

4 *Dillon v Arkins* (1885) 17 LR Ir 636, Ir CA; *Re Bodman, Bodman v Bodman* [1891] 3 Ch 135; *Re Connolly, Walton v Connolly* (1914) 110 LT 688; *Re Humphreys, Wren v Ward* (1915) 114 LT 230. A direction to invest in stocks, shares or convertible debentures 'in the 'blue chip' category' is too uncertain to be enforceable: *Re Kolb's Will Trusts* [1962] Ch 531, [1961] 3 All ER 811. As to the construction of investment clauses generally see TRUSTS vol 48 (2007 Reissue) PARA 1005 et seq.

5 See *Re Inman, Inman v Inman* [1915] 1 Ch 187. Cf *Re Willis, Spencer v Willis* [1911] 2 Ch 563. As to whether a bequest of stock is general or specific see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 473.

6 *Slingsby v Grainger* (1859) 7 HL Cas 273 at 280, 285; cf *Re Hill, Fettes v Hill* [1914] WN 132 ('public stocks of the Bank of England'). As to the National Debt see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1325 et seq.

7 *Slingsby v Grainger* (1859) 7 HL Cas 273. See also *Ridge v Newton* (1842) 2 Dr & War 239; *Burnie v Getting* (1845) 2 Coll 324; *Ellis v Eden* (1857) 23 Beav 543; *Howard v Kay* (1858) 27 LJ Ch 448; *Brown v Brown* (1858) 6 WR 613; *Wilday v Sandys* (1869) LR 7 Eq 455.

8 *Mangin v Mangin* (1852) 16 Beav 300; *Ellis v Eden* (1857) 23 Beav 543 (foreign funds); *Slingsby v Grainger* (1859) 7 HL Cas 273; *Cadett v Earle* (1877) 5 ChD 710.

9 *Re Price, Trumper v Price* [1932] 2 Ch 54. See also *Re Ionides, London County Westminster and Parr's Bank Ltd v Craies* [1922] WN 46 (where Exchequer bonds issued under the War Loan Act 1919 were included in 'war loans'); *Re Cruse, Gass v Ingham* [1930] WN 206.

10 *Re Balchin* (1922) 38 TLR 868. In *Re Gifford, Gifford v Seaman* [1944] Ch 186, [1944] 1 All ER 268, consolidated inscribed stock passed under the description of 'War Bonds' on the principle of 'falsa demonstratio non nocet' (see PARA 561 ante), but not national savings certificates and defence bonds not held by the testatrix at the date of her will. A gift of 'war savings certificates' was held not to include national savings certificates where the testatrix had both: *Re Lamb, Marston v Chauvet* (1933) 49 TLR 541.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/587. Miscellaneous terms.

587. Miscellaneous terms.

In the construction of wills, the meaning in various contexts of the following terms has been discussed: 'arrear of rent'¹; 'articles of domestic use or ornament'²; 'articles of vertu'³; 'bonds'⁴; 'books'⁵; 'carriage'⁶; 'cash'⁷; 'debentures'⁸; 'fortune'⁹; 'furniture'¹⁰; 'horses'¹¹ and 'bloodstock'¹²; 'household effects'¹³, 'household furniture'¹⁴, 'household furniture and effects'¹⁵, 'household goods'¹⁶, 'personal and household goods and effects'¹⁷, 'contents of my house' or 'home'¹⁸, and similar expressions¹⁹; 'jewellery'²⁰; 'movables'²¹; 'pictures'²²; 'plate'²³; and 'private papers'²⁴. 'Pensions and allowances' has been held not to include subscriptions and donations which are purely voluntary²⁵. 'Wages' has been held to mean fixed cash payments, and not other benefits such as commission²⁶.

1 *Re Ford, Myers v Molesworth* [1911] 1 Ch 455.

2 *Petre v Ferrers* (1891) 61 LJ Ch 426 (not relics); *Re Owen, Peat v Owen* (1898) 78 LT 643.

3 *Re Baroness Zouche, Dugdale v Baroness Zouche* [1919] 2 Ch 178; *Re Tomline's Will Trusts, Pretymen v Pretymen* [1931] 1 Ch 521. See also *Re Lord Londesborough, Bridgeman v Lord Fitzgerald* (1880) 50 LJ Ch 9.

4 Bonds are instruments under seal, and do not include certificates of stock not sealed: *Re Manners, Manners v Manners* [1923] 1 Ch 220.

5 Manuscript letters bound in volumes may pass as 'books' (*Re Tomline's Will Trusts, Pretymen v Pretymen* [1931] 1 Ch 521 (certain of the 'Paston Letters')); so also may a manuscript log book (*Re Barratt, Barratt v Coates* (1915) 31 TLR 502, CA). See also *Re Masson, Morton v Masson* (1917) 86 LJ Ch 753, CA (stamp collection not included in 'books'), disapproving *Re Fortlage, Ross v Fortlage* (1916) 60 Sol Jo 527.

6 *Denholm's Trustees v Denholm* 1908 SC 43, Ct of Sess (car included).

7 See PARA 584 ante.

8 *Re Herring, Murray v Herring* [1908] 2 Ch 493 (debenture stock included). See also *Phillips v Eastwood* (1835) L & G temp Sugd 270 at 291-292 (policies of assurance included under the particular will). The decision in *Re Lane, Luard v Lane* (1880) 14 ChD 856 (debenture stock not included) has sometimes been doubted: see *Dillon v Arkins* (1885) 17 LR Ir 636, Ir CA. A gift of debenture stock passes debentures if no debenture stock exists to satisfy the gift: *Re Nottage, Jones v Palmer (No 2)* [1895] 2 Ch 657, CA.

9 *Baring v Ashburton* (1886) 54 LT 463. See also *Bacon v Cosby* (1851) 4 De G & Sm 261; *Spearing v Hawkes* (1857) 6 LJ Ch R 297.

10 *Re Seton-Smith, Burnand v Waite* [1902] 1 Ch 717 (tenant's and trade fixtures there excluded). See also *Hele v Gilbert* (1752) 2 Ves Sen 430 (china); *Cremorne v Antrobus* (1829) 5 Russ 312; *Holden v Ramsbottom* (1863) 4 Giff 205 (plated articles); *Re Lord Londesborough, Bridgeman v Lord Fitzgerald* (1880) 50 LJ Ch 9 (pictures); *Petre v Ferrers* (1891) 61 LJ Ch 426 (not relics); *Re Willey, Goulding v Shirtcliffe* (1929) 45 TLR 327 (cabinet wireless set). Books as a rule are not included, at any rate in an eighteenth-century will (*Bridgeman v Dove* (1744) 3 Atk 201 at 202; *Kelly v Powlet* (1763) Amb 605; *Cremorne v Antrobus* supra at 321; *Porter v*

Tournay (1797) 3 Ves 311), but it seems that, having regard to modern habits of life, an intention to include books in the term is now readily inferred (see *Re Holden* (1903) 5 OLR 156 at 162), eg in a gift of a house and its furniture, as kept up in the testator's lifetime (*Ouseley v Anstruther* (1847) 10 Beav 453 at 462; *Hutchinson v Smith* (1863) 1 New Rep 513). In *Re Crispin's Will Trusts*, *Arkwright v Thurley* [1975] Ch 245, [1974] 3 All ER 772, CA, it was held that clocks do not cease to be furniture because they form part of a collection.

11 *Re Sykes, Skelton and Dyson v Sykes* [1940] 4 All ER 10 (where an interest as tenant in common in three horses did not pass).

12 *Re Gillson, Ellis v Leader* [1949] Ch 99, [1948] 2 All ER 990, CA (where a half share in a thoroughbred horse passed but not a fortieth interest in another horse managed by a syndicate, as this interest was in the nature of an investment).

13 *Re Bourne, Bourne v Brandreth* (1888) 58 LT 537 (wine included) (following *Cole v Fitzgerald* (1823) 1 Sim & St 189 (on appeal (1827) 3 Russ 301)); *Re Ashburnham, Gaby v Ashburnham* (1912) 107 LT 601; *Re White, White v White* [1916] 1 Ch 172; *Re Fortlage, Ross v Fortlage* (1916) 60 Sol Jo 527 (in the last three cases cited a car was included); *Burnside v Burnside* (1921) 56 ILT 20 (furniture and books in college rooms included); *Re Baron Wavertree of Delamere, Rutherford v Hall-Walker* [1933] Ch 837 (cars, consumable stores, garden implements and movable plants included).

14 *Kelly v Powlet* (1763) Amb 605 (plate, pictures etc); *Manning v Purcell* (1855) 7 De GM & G 55 at 68 (such part of tavern furniture as was for domestic or personal use); *Stone v Parker* (1860) 29 LJ Ch 874 (cows, horses and farming stock prima facie excluded); *Finney v Grice* (1878) 10 ChD 13 (tenant's fixtures excluded).

15 *Pratt v Jackson* (1726) 1 Bro Parl Cas 222 (furniture in house let furnished excluded); *Northey v Paxton* (1888) 60 LT 30 (not jewellery). See also *Tempest v Tempest* (1856) 2 K & J 635 (personal ornaments and chattels not for use or ornament in the house excluded); *Field v Peckett (No 2)* (1861) 29 Beav 573 (ornaments); *Stone v Parker* (1860) 1 Drew & Sm 212 (not farming stock); *Re Hammersley, Heasman v Hammersley* (1899) 81 LT 150 (jewellery excluded); *MacPhail v Phillips* [1904] 1 IR 155 (stock in trade excluded); *Re Howe, Ferniehough v Wilkinson* [1908] WN 223 (car included); *Re White, White v White* [1916] 1 Ch 172 (cars included); *Re Fothergill, Horwood v Fothergill* (1916) 51 L Jo 169 (kangaroos and various birds held not to pass under gift of 'articles of household use or ornament').

16 *Pellew v Horsford* (1856) 2 Jur NS 514. See also *Nicholls v Osborn* (1727) 2 P Wms 419; *Stapleton v Conway* (1750) 1 Ves Sen 427; *Re Johnson, Sandy v Reilly* (1905) 92 LT 357 ('household property' shown to mean residue).

17 *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490 (library of books, etchings and mountain photographs shown by context not to be included). For the meanings of 'effects' and 'personal effects' see PARA 579 ante.

18 *Re Eumorfopoulos, Ralli v Eumorfopoulos* [1944] Ch 133, [1943] 2 All ER 719 (articles normally kept in the house but temporarily sent away included; articles at the bank or occasionally at the house excluded; cf para 576 ante); *Re Abbott, Public Trustee v St Dunstan's, British Home and Hospital for Incurables and Trustees of Western Ophthalmic Hospital and Lady Dugan* [1944] 2 All ER 457, CA (choses in action not included).

19 In ascertaining what passes under such a bequest in the will of a tradesman, the court will direct an inquiry, distinguishing articles used for his own domestic or personal use and those used in trade or as merchandise: see the decree in *Le Farrant v Spencer* (1748) 1 Ves Sen 97 (cited in *Manning v Purcell* (1855) 7 De GM & G 55 at 64n).

20 *Re Whitby, Public Trustee v Whitby* [1944] Ch 210, [1944] 1 All ER 249.

21 *Re Walsh, Walsh v Walsh* [1953] Ch 473, [1953] 1 All ER 982 (movable chattels only).

22 *Re Du Maurier, Millar v Coles* (1916) 32 TLR 579; *Re Layard, Layard v Earl of Bessborough* (1916) 85 LJ Ch 505, CA (appeal withdrawn on terms (1917) 33 TLR 261, HL); *Re Lane, Meagher v National Gallery for Ireland* (1917) 33 TLR 418 (right to have portrait painted).

23 *Holden v Ramsbottom* (1863) 4 Giff 205 (plated articles excluded); not followed in *Re Grimwood, Trehwella v Grimwood* [1946] Ch 54, [1945] 2 All ER 686 (Sheffield plate and electro-plate included). See also *Re Lewis, Prothero v Lewis* (1909) 26 TLR 145 (silver-mounted articles excluded); *Field v Peckett (No 2)* (1861) 29 Beav 573 at 574.

24 *Re Dickens, Dickens v Hawkesley* [1935] Ch 267, CA.

25 *Re Scott, Scott v Scott (No 2)* (1915) 31 TLR 505.

26 *Re Smith, Phillips v Smith* [1915] WN 12; *Re Peacock, Public Trustee v Birchenough* (1929) 45 TLR 301. See also *Re Whelan, Doyle v Woodliff* (1922) 153 LT Jo 47.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/588. Release of debts.

588. Release of debts.

Where a testator by his will releases all debts owing to him, it depends on the circumstances whether this is confined to personal debts¹, or extends to business or other debts², and whether or not both secured and unsecured debts are released³.

1 *Re Neville, Neville v First Garden City Ltd* [1925] Ch 44.

2 *Midland Bank Executor and Trustee Co Ltd v Yarners Coffee Ltd* [1937] 2 All ER 54. Even on this wider construction the release will not, it seems, extend to money at a bank on current or deposit account: *Midland Bank Executor and Trustee Co Ltd v Yarners Coffee Ltd* supra at 56-57. Where there is a direction that debts due from a legatee are to be brought into account, and the debts exceed the legacy, there is no release of the excess: *Re Clark, Cross v Hillis* [1924] WN 75.

3 *Re Coghill, Drury v Burgess* [1948] 1 All ER 254 (where unsecured, but not secured, debts were released). As to the effect of legacies to debtors see PARA 505 ante; and as to the time for determining what debts are released see PARA 573 note 5 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(1) PROPERTY PASSING/(iii) Effect of Particular Words/589. Residuary gifts.

589. Residuary gifts.

In a suitable context, many words are capable of denoting the whole or the residue of the testator's real and personal estate¹. A gift of 'the remainder' of the residuary fund may, on the construction of the will, be either a gift of the balance of the fund after a deduction of previous gifts out of it, or a gift of the whole fund subject to the previous gifts; in the latter case, but not the former, the gift of the fund carries with it any previous gift which fails².

The appointment of any person to be 'residuary legatee' prima facie³ gives him only the residue of the personal estate⁴. If, however, the context or the circumstances require, it may also pass the residue of the real estate, as, for example, where the intention to dispose of the whole real and personal estate is shown or to be inferred⁵. The fact that parts of the real estate are specifically devised may be sufficient to give the residuary legatee the residue of the real estate⁶, but not where the residuary legatee is one of the specific devisees⁷. The fact that the testator had no real estate at the date of his will⁸, or had no real estate other than that of which the will contains specific and complete dispositions⁹, is evidence against this extension of the meaning of 'residuary legatee', but not conclusive evidence¹⁰.

The effect of a gift of general residue, and the property comprised in it, are dealt with elsewhere in this work¹¹. Similar rules hold good as to particular residuary gifts by way of general descriptions of particular kinds of property belonging to the testator remaining undisposed of¹². A direction that, on the failure or determination of the trusts declared concerning a share of residue, the share is to fall into residue prima facie constitutes a gift of that share by way of addition to the other shares of residue¹³.

If a testator's residuary estate is given by his will in proportional shares, and one or more of the shares of residue are exempt from inheritance tax (usually because given to the testator's spouse or to a charity) while another or other shares are not so exempt, in the absence of express provision to the contrary the residuary estate is divided in the proportions provided by the will without regard to any inheritance tax attributable to the non-exempt shares, and any such inheritance tax is then borne by those shares¹⁴.

1 *Blight v Hartnoll* (1883) 23 ChD 218 at 222, CA. See also *Huxtep v Brooman* (1785) 1 Bro CC 437 ('all I am worth'); *Doe d Wall v Langlands* (1811) 14 East 370 ('the residue of all my property, goods and chattels'); *Fleming v Burrows* (1826) 1 Russ 276 ('or what else I may then be possessed of at my decease'); *Wilce v Wilce* (1831) 7 Bing 664 ('everything else I die possessed of'); *Cogswell v Armstrong* (1855) 2 K & J 227 ('all other real and personal estate'); *Re Greenwich Hospital Improvement Act* (1855) 20 Beav 458 ('all my . . . other property of every description'); *Attree v Attree* (1871) LR 11 Eq 280 ('all the rest'); *Smyth v Smyth* (1878) 8 ChD 561 ('all the rest, residue . . . and all other my effects'); *Re Johnson, Sandy v Reilly* (1905) 49 Sol Jo 314 ('the remainder of my household property'); *Re Craven, Crewdson v Craven* (1908) 24 TLR 750 ('the rest of my investments'); *Re Brace, Gurton v Clements* [1954] 2 All ER 354, [1954] 1 WLR 955 ('any possessions I may have'); *Re Gammon, Shelton v Williams* [1986] CLY 3547 ('remainder of money'). It seems that 'etc' may suffice: *Chapman v Chapman* (1876) 4 ChD 800; *Re Andrew's Estate, Creasey v Graves* (1902) 50 WR 471. For the meaning of 'effects' see PARA 579 ante; and for the meaning of 'estate' see PARA 580 ante.

2 *Re Parnell, Ranks v Holmes* [1944] Ch 107.

3 Eg when used alone or in a will which appears to make a distinction between real and personal property: *Singleton v Tomlinson* (1878) 3 App Cas 404 at 417. Other words in the will may negative the prima facie beneficial interest of the residuary legatee: *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384.

4 *Wills v Wills* (1841) 1 Dr & War 439. See also *Kellett v Kellett* (1815) 3 Dow 248, HL (explained in *Windus v Windus* (1856) 6 De GM & G 549 at 557-558); *Lea v Grundy* (1855) 1 Jur NS 951; *Cooney v Nicholls* (1881) 7 LR 107, 1r CA; *Gethin v Allen* (1888) 23 LR 1r 236; *Re Morris, Morris v Atherden* (1894) 71 LT 179.

5 *Pitman v Stevens* (1812) 15 East 505; *Day v Davenport* (1841) 12 Sim 200; *Davenport v Coltman* (1842) 12 Sim 588; *Warren v Newton* (1844) Drury temp Sugd 464; *Evans v Crosbie* (1847) 15 Sim 600; *Wildes v Davies* (1853) 1 Sm & G 475; *Re Gyles* (1863) 14 I Ch R 311; *Singleton v Tomlinson* (1878) 3 App Cas 404; *Re Salter, Farrant v Carter* (1881) 44 LT 603; *Re Greally, Travers v O'Donoghue* [1910] 1 IR 239 at 242. See also *Re Pereira, Worsley v Society for the Propagation of the Gospel* (1912) 28 TLR 479.

6 *Hughes v Pritchard* (1877) 6 ChD 24, CA (explained in *Re Methuen and Blore's Contract* (1881) 16 ChD 696 at 700; and followed in *Re Bailey, Barclays Bank Ltd v James* [1945] Ch 191, [1945] 1 All ER 616).

7 *Hillas v Hillas* (1847) 10 I Eq R 134; *Re Morris, Morris v Atherden* (1894) 71 LT 179; *Re Gibbs, Martin v Harding* [1907] 1 Ch 465 at 468.

8 *Re Methuen and Blore's Contract* (1881) 16 ChD 696.

9 *Re Gibbs, Martin v Harding* [1907] 1 Ch 465.

10 *Re Stephen, Stephen v Stephen* [1913] WN 210 (where *Re Gibbs, Martin v Harding* [1907] 1 Ch 465 is distinguished in the context of that case). See also *Re Fetherston-Haugh-Whitney's Estate* [1924] 1 IR 153, 1r CA.

11 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 531. As to the effect of two residuary gifts see PARA 524 ante; and as to the distinction between a gift of the residue and a gift of the residue of the residuary estate see *Re Whitrod, Burrows v Base* [1926] Ch 118.

12 *M'Kay v M'Kay* [1900] 1 IR 213 at 217 (residue of furniture etc); *Mason v Ogden* [1903] AC 1, HL (residue of freeholds). In *Re Brown* (1855) 1 K & J 522 (hereditaments comprised in a settlement) and *Springett v Jennings* (1871) 6 Ch App 333 (hereditaments in a named parish) the descriptions were specific and not general.

13 *Re Palmer, Palmer v Answorth* [1893] 3 Ch 369, CA (life interest substituted for absolute interest by codicil; share to fall into residue on death of life tenant); *Re Allan, Dow v Cassaigne* [1903] 1 Ch 276, CA (share to fall into residue on death of beneficiary without having issue); *Re Wand, Escritt v Wand* [1907] 1 Ch 391 (share to be forfeited and fall into residue if certain event happened during testator's life). See also *Re Ballance, Ballance v Lanphier* (1889) 42 ChD 62; and PARA 463 ante.

14 *Re Ratcliffe, Holmes v McMullan* [1999] STC 262 (not following *Re Benham's Will Trusts, Lockhart v Harker* [1995] STC 210). As to inheritance tax generally see INHERITANCE TAXATION.

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(2) PERSONS ENTITLED TO TAKE

(i) Time of Ascertainment of Donees

A. IN GENERAL

590. General considerations.

The ascertainment of the donee is an element in ascertaining the vesting of a gift. Accordingly, the presumption in favour of early vesting¹ has been invoked, in doubtful cases, to assist in determining which of various persons was intended by a description capable of denoting any of them²; but in general this presumption does no more than suggest the most desirable method of carrying the testator's intention into effect, and does not assist in finding out whom he intended as the objects of his bounty³. In a class gift⁴ an express direction as to vesting (for example at a specified age), or a gift over, is in general immaterial in ascertaining the class⁵, unless it alters the description of the class⁶.

1 As to the presumption in favour of early vesting see PARA 697 post.

2 *Radford v Willis* (1871) 7 Ch App 7 at 10. The 'rules of convenience' (see PARAS 596-599 post) are sometimes said to be directed to make the property vest as early as possible: *Gimblett v Purton* (1871) LR 12 Eq 427 at 430.

3 *Doe d Smith v Fleming* (1835) 2 Cr M & R 638 at 654 per Lord Abinger CB.

4 See PARAS 464-465 ante.

5 *Williams v Haythorne*, *Williams v Williams* (1871) 6 Ch App 782. See also *Re Payne* (1858) 25 Beav 556 (vested at 21 or on leaving issue at death before that age).

6 *Williams v Russell* (1863) 10 Jur NS 168; *Re Knowles*, *Nottage v Buxton* (1882) 21 ChD 806.

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591. Gifts to individuals.

Where the donee is designated by a description which may at different times apply to different individuals, and the context does not point to any specific future time as the time at which the donee is to be ascertained, then prima facie the only person who is entitled to take is the one who satisfies the description at the date of the will¹, provided that there is a person who to the testator's knowledge then satisfies it². Where the context shows that the donee is to be ascertained in the future, but does not show at what specific time, then the first person to satisfy the description is presumed to be intended³. The context may, however, show that the donee in each case is to be ascertained at the testator's death⁴, or some other definite future

time⁵. Where a qualification is required as a condition precedent to the vesting of an interest, the qualification must be satisfied at the date when the interest vests in possession⁶.

Donees may be partly designated by gender, for example the eldest son of an individual, or an individual's daughters. The fact that a person has an acquired gender⁷ does not affect the disposal or devolution of property under a will made before 4 April 2005⁸. After that day, and after a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)⁹. This will not affect things done, or events occurring, before the certificate is issued; but it will operate for the interpretation of wills made on or after 4 April 2005, whether they are made before the certificate is issued or afterwards¹⁰.

1 The provisions of the Wills Act 1837 s 24 (see PARA 573 ante) do not apply with reference to the objects of the testator's bounty: *Bullock v Bennett* (1855) 7 De GM & G 283 at 285-286. As to where the designation is that of the holder of an office see *Re Jones' Estate* (1927) 43 TLR 324; and PARA 652 post.

2 *Thompson v Thompson* (1844) 1 Coll 381 at 388, 391 (eldest son at date of codicil took); *Re Whorwood, Ogle v Lord Sherborne* (1887) 34 ChD 446, CA (to 'Lord S'); *Amyot v Dwaris* [1904] AC 268, PC ('the eldest son of my sister'). See also *Lomax v Holmden* (1749) 1 Ves Sen 290. As to gifts to the holder of an office see PARA 652 post; as to gifts to a 'wife' see PARA 634 post; and as to gifts to servants see PARAS 650-651 post.

3 *Radford v Willis* (1871) 7 Ch App 7 (gift to future 'husband' of daughter unmarried at date of will); *Re Hickman, Hickman v Hickman* [1948] Ch 624, [1948] 2 All ER 303 (gift to future 'wife' of grandson unmarried at testatrix's death). As to gifts to one of a number of persons see PARA 557 ante; and as to gifts to an 'eldest son' etc see PARA 623 post.

4 *Re Laffan and Downes' Contract* [1897] 1 IR 469 (superiress of two convents at the testatrix's death); *Re Daniels, London City and Midland Executor and Trustee Co Ltd v Daniels* (1918) 87 LJ Ch 661 (legacy to the Lord Mayor 'for the time being'; the holder of the office at the testator's death held entitled).

5 See *Re Earl of Cathcart* (1912) 56 Sol Jo 271 (gift to a successor to a title); *Re Earl of Caledon, Almander v Earl of Caledon* [1915] 1 Ch 150 (gift of chattels to the person who should become entitled to a house); *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234, CA (gift to such 'as shall then be living').

6 *Re Allen, Faith v Allen* [1954] Ch 259, [1954] 1 All ER 526.

7 Ie acquired in accordance with the Gender Recognition Act 2004: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

8 *Ibid* s 15.

9 *Ibid* s 9(1). Section 9(1) is subject to provision made by the Gender Recognition Act 2004 (eg s 15) or any other enactment or any subordinate legislation: s 9(3).

10 *Ibid* s 9(2). Where a disposition or devolution of any property under a will made on or after 4 April 2005 (ie the appointed day) is different from what it would be but for the fact that a person's gender has become an acquired gender, he may apply to the High Court for an order on the ground of being adversely affected by the different disposition or devolution of the property: s 18(1), (2). The court may then, if it is satisfied that it is just to do so, make in relation to any person benefiting from the different disposition or devolution of the property such order as it considers appropriate, and in particular may make provision for the payment of a lump sum to the applicant, the transfer of property to the applicant, the settlement of property for the benefit of the applicant, or the acquisition of property and either its transfer to the applicant or its settlement for the benefit of the applicant: s 18(3), (4). An order may also contain consequential or supplementary provisions for giving effect to the order or for ensuring that it operates fairly as between the applicant and the other person or persons affected by it, and an order may, in particular, confer powers on trustees: s 18(5).

592. Gifts to groups of individuals.

If the gift is immediate and is a separate bequest of a specific amount to each one of a group of certain children who are to take as individuals and not as a class, prima facie only those in existence at the testator's death may take, and those coming into existence afterwards are excluded¹. The fact that at the date of the will or of the testator's death there are no members of the group in existence does not render future members admissible². If such a gift is postponed, all those who come into existence before the time of distribution are let in³. The rule is grounded on the inconvenience of postponing distribution until all the children who might be born and the total amount of their bequests can be ascertained⁴, and accordingly it does not apply where by the provisions of the will this inconvenience does not exist⁵, or is expressly contemplated by the testator⁶.

1 *Garbrand v Mayot* (1689) 2 Vern 105 (child born after date of will); *Ringrose v Bramham* (1794) 2 Cox Eq Cas 384 (a legacy 'to every child he hath by his wife E'); *Storrs v Benbow* (1833) 2 My & K 46 (on appeal (1853) 3 De GM & G 390) (gift to 'each child that may be born to' certain persons; a child en ventre sa mère was held to be included, but other children born after the death of the testator were excluded); *Townsend v Early* (1860) 3 De GF & J 1 ('may be born' covered only those born between the date of the codicil and the testator's death or en ventre leur mères at his death). See also *Butler v Lowe* (1839) 10 Sim 317 (under a gift to each of the children of certain persons, begotten or to be begotten, children born after the death of the testator were excluded); *Peyton v Hughes* (1842) 7 Jur 311; *Mann v Thompson* (1854) Kay 628 ('to all and every the child and children'); *Rogers v Mutch* (1878) 10 ChD 25 ('to each of the children who shall live to attain' 21); *Re Thompson's Will, Brahe v Mason* [1910] VLR 251; *Re Bellville, Westminster Bank Ltd v Walton* [1941] Ch 414, [1941] 2 All ER 629, CA ('any daughter of B born after the date of this my will'). As to gifts to classes and groups see also PARAS 464-465 ante.

2 *Mann v Thompson* (1854) Kay 628 at 644; *Rogers v Mutch* (1878) 10 ChD 25.

3 *A-G v Crispin* (1784) 1 Bro CC 386.

4 *Mann v Thompson* (1854) Kay 628 at 643; *Rogers v Mutch* (1878) 10 ChD 25; *Re Bellville, Westminster Bank Ltd v Walton* [1941] Ch 414 at 418, [1941] 2 All ER 629 at 631, CA.

5 *Re Bellville, Westminster Bank Ltd v Walton* [1941] Ch 414 at 419, [1941] 2 All ER 629 at 632, CA. In *Evans v Harris* (1842) 5 Beav 45, a fund was set apart out of which alone the legacies in question were payable; a child born after the testatrix's death was let in.

6 *Re Bellville, Westminster Bank Ltd v Walton* [1941] Ch 414 at 419, [1941] 2 All ER 629 at 632, CA. See also *Defflis v Goldschmidt* (1816) 1 Mer 417 (postponed gift; all members included).

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B. CLASS GIFTS

593. Time when class ascertained.

In class gifts the interests of all the members must vest in interest at the same time; so, for example, if there is a gift to A for life and then to B and the children of C, the class must vest in interest at the testator's death, even though it is capable of enlargement by the birth of subsequent children of C during the lifetime of the life tenant¹. The class may be ascertained at any particular point of time², for example at the death of the testator³, or of the life tenant⁴, or during the testator's lifetime at the date when he made his will⁵, and the period of distribution may be postponed to a different and later time⁶.

The words of the will may clearly indicate the point of time at which the class is to be ascertained; thus in a gift to children 'now living', only those in existence at the date of the will can take, and all children born after that date are excluded⁷. Similarly, in a gift to children living at the death of the testator or any other person⁸, or at any particular future time⁹, or to children now born or to be born during the lifetime of their named parent¹⁰, the time of ascertaining the class is fixed by the express words of the will. In order to close a class, the court will not presume that a woman is past childbearing¹¹ or inquire into an individual's capacity to have children¹².

1 *Kingsbury v Walter* [1901] AC 187 at 194 per Lord Davey.

2 *Re Hannam, Haddelsey v Hannam* [1897] 2 Ch 39.

3 *Viner v Francis* (1789) 2 Cox Eq Cas 190; *Leigh v Leigh* (1854) 17 Beav 605; *Sanders v Ashford* (1860) 28 Beav 609.

4 *Smith v Smith* (1837) 8 Sim 353; *Lee v Pain* (1844) 4 Hare 201 at 250.

5 *Re Hornby's Will* (1859) 7 WR 729.

6 *Re Hannam, Haddelsey v Hannam* [1897] 2 Ch 39.

7 *James v Richardson* (1677) 1 Eq Cas Abr 214 pl 11; affd (1678) Freem KB 472n, HL.

8 *Barker v Lea* (1814) 3 Ves & B 113; *Jennings v Newman* (1839) 10 Sim 219 (where the gift was postponed to a life estate to one of the class, who was held to take); *Turner v Hudson* (1847) 10 Beav 222; *Re Helsby, Neate v Bozie* (1914) 84 LJ Ch 682 (where the gift was to the next of kin of the testator at the death of the life tenant); *Re Bulcock, Ingham v Ingham* [1916] 2 Ch 495 (where the gift was to an artificial class of next of kin of a special kind). Where the next of kin are to be ascertained at a specified time subsequent to the death of the testator, the class is ascertained on the hypothesis that the testator dies at the specified time: *Hutchinson v National Refuges for Homeless and Destitute Children* [1920] AC 795, HL. See also *Re Mellish, Day v Withers* [1916] 1 Ch 562; and PARA 604 post.

9 *Jee v Audley* (1787) 1 Cox Eq Cas 324; *Hughes v Hughes* (1807) 14 Ves 256 (youngest grandchild attaining 21); *Dodd v Wake* (1837) 8 Sim 615; *Boughton v Boughton* (1848) 1 HL Cas 406; *Hodson v Micklethwaite* (1854) 2 Drew 294; *Stuart v Cockerell* (1870) 5 Ch App 713. See also *Re Deighton's Settled Estates* (1876) 2 ChD 783, CA; *Wylie's Trustees v Bruce* 1919 SC 211 (gift to heirs of A after life estate); *Conolly v Brophy* (1920) 54 ILT 41 (bequest to children surviving when youngest attains 21). Where life interests are given to several persons in succession, and on the death of the last-named person there is a gift to a class of persons 'then living', the word 'then' is generally to be taken as referring grammatically to the death of that person, even where his death took place before that of the testator: *Archer v Jegon* (1837) 8 Sim 446; *Re Milne, Grant v Heysham* (1887) 56 LJ Ch 543 (affd (1888) 57 LT 828, CA); *Palmer v Orpen* [1894] 1 IR 32. In *Gaskell v Holmes* (1844) 3 Hare 438, 'then' was referred to the death of the testator; and in *Widdicombe v Muller* (1853) 1 Drew 443, 'then' was referred to the death of an annuitant.

10 *Scott v Earl of Scarborough* (1838) 1 Beav 154.

11 *Re Deloitte, Griffiths v Deloitte* [1926] Ch 56 (applying *Jee v Audley* (1787) 1 Cox Eq Cas 324). In *Berry v Green* [1938] AC 575, sub nom *Re Blake, Berry v Geen* [1938] 2 All ER 362, HL, the question was reserved. For the purpose of the rule against perpetuities and of terminating accumulations of income as applied to instruments taking effect on or after 16 July 1964, a woman over 55 is presumed to be past childbearing; see the Perpetuities and Accumulations Act 1964 ss 2, 14; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1066, 1120.

12 *Figg v Clarke* [1997] 1 WLR 603. The court might, however, authorise a distribution on the basis that an individual is incapable of having further children: *IRC v Bernstein* [1960] Ch 444 at 454, [1960] 1 All ER 697 at 702; *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n at 401n, [1963] 1 WLR 820 at 822; *Re Pettifor's Will Trusts, Roberts v Roberts* [1966] Ch 257, [1966] 1 All ER 913; *Figg v Clarke* supra at 609-610; *Re Levy Estate Trust* [2000] CLY 5263.

UPDATE

593 Time when class ascertained

NOTE 2--See also *Thomas v Kent* [2006] EWCA Civ 1485, [2007] WTLR 178.

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594. Gift to class on contingency.

Where there is a gift to a class on a contingent event, the time of happening of the contingency is not imported into the description of the individuals composing the class¹. The circumstance, however, that the gift is only to take effect on the happening of the contingency is to be taken into consideration in combination with indications of the testator's intention to be found in other parts of his will², and, on the whole of the will, the description of the class may be varied and the contingency applied to the class³.

1 *Boulton v Beard* (1853) 3 De GM & G 608 at 612 per Turner LJ; *Hickling v Fair* [1899] AC 15 at 35, HL, per Lord Davey; *Re Walker, Dunkerly v Hewerdine* [1917] 1 Ch 38; *Re Sutcliffe, Alison v Alison* [1934] Ch 219. Hence the contingency that there are to be issue living at the time of distribution is not imported into the description of the issue who are to take, so as to exclude issue who have died before the date of distribution: *Re Sutcliffe, Alison v Alison* supra.

2 *Selby v Whittaker* (1877) 6 ChD 239 at 250, CA, per Baggallay LJ.

3 *Selby v Whittaker* (1877) 6 ChD 239, CA. Thus in a gift (if a named person should leave any child) to all his children, the class is not restricted to children whom he leaves at his death: *Boulton v Beard* (1853) 3 De GM & G 608; *M'Lachlan v Taitt* (1860) 2 De GF & J 449. As to the application to wills of the rule in *Emperor v Rolfe* (1748-9) 1 Ves Sen 208 see PARA 551 ante. The context may, however, show the contrary, eg if the gift is to 'such' children (*Re Watson's Trusts* (1870) LR 10 Eq 36; and see *Sheffield v Kennett* (1859) 4 De G & J 593), or is to 'vest' (in the legal sense) at the death of the parent (*Selby v Whittaker* supra; and see *Wilson v Mount* (1854) 19 Beav 292 (gift over, if no 'such' issue)).

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595. Rules of convenience.

Where it cannot be gathered, from the context and circumstances, what time is referred to for ascertaining a class, the court acts on certain rules of construction¹ which have been framed for the convenience of the donees and the administration of the property, and have accordingly been called rules of convenience².

1 As to these rules see PARA 596 et seq post. They are not overriding rules of law: see *Re Wernher's Settlement Trusts, Lloyds Bank Ltd v Earl Mountbatten* [1961] 1 All ER 184 at 187, [1961] 1 WLR 136 at 139 per Buckley J (citing *Re Bleckly, Bleckly v Bleckly* [1951] Ch 740 at 750, [1951] 1 All ER 1064 at 1070, CA). The testator should, it seems, be taken to have framed his trust with the rule in mind, unless the assumption is conclusively negated by the words of the will: see *Re Wernher's Settlement Trusts, Lloyds Bank Ltd v Earl Mountbatten* supra at 189 and 141.

2 *Re Emmet's Estate, Emmet v Emmet* (1880) 13 ChD 484, CA; *Re Powell, Crosland v Holliday* [1898] 1 Ch 227 at 230 per Kekewich J. As to what gifts are subject to the rules see PARAS 601-602 post. The rules are admittedly 'not founded on any view of the testator's intention' (*Re Emmet's Estate, Emmet v Emmet* supra at 490 per Jessel MR; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520 at 527, CA), and are 'artificial' (*Leake v Robinson* (1817) 2 Mer 363 at 383 per Grant MR; *Re Chartres, Farman v Barrett* [1927] 1 Ch 466). The

rules generally for ascertainment of a class, both as to personal property and real property, are said to be founded on the presumption that only persons in being are intended to take: *Ellison v Airey* (1748) 1 Ves Sen 111 at 114; *Crone v Odell* (1811) 1 Ball & B 449 at 459 (affd (1815) 3 Dow 61, HL); *Bartleman v Murchison* (1831) 2 Russ & M 136 at 140. As to implied gifts to the objects of an unexercised power of selection, and as to the rules for ascertaining a class taking in default of appointment under a power see POWERS vol 36(2) (Reissue) PARAS 209-210.

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596. The first rule of convenience.

The first rule of convenience is as follows: a class¹ is prima facie composed of those members (if any) existing, ascertainable and capable of taking² at the date of distribution³, which is usually at the testator's death⁴, but, where the date of distribution is later, the class opens so as to let in all those members coming into existence before the date of distribution⁵. Where, however, the gift is immediate, but at the testator's death no member of the class has yet come into existence, then prima facie all the members of the class who are born at any future period are intended to take under the gift⁶.

The class is ascertained independently of those members of it who die before the testator; there is no question of lapse of their shares, and they are not included⁷; nor, formerly, even where they were issue of the testator, did they take by leaving issue living at his death, even if the class consisted of only one person⁸. However, under the will of a testator who dies on or after 1 January 1983, if the class consists of children or remoter descendants of his, and a member of that class dies before him leaving issue, and issue of that member are living at the testator's death, then, unless a contrary intention appears by the will, the devise or bequest takes effect as if the class included the issue of its deceased member living at the testator's death⁹.

As regards members of a class taking under a postponed gift, the death of any one of them who has survived the testator but dies before the date of distribution does not defeat his interest¹⁰, provided that the contingency of surviving that date is not part of the description of the class¹¹. Thus the objects among whom the property becomes ultimately divisible are those members of the class who may be living at the date of distribution, and the representatives of such as may have died before that date having survived the testator¹².

1 As to what kinds of classes are subject to this rule see PARA 600 post.

2 See *Fell v Biddolph* (1875) LR 10 CP 701 at 709 (where two of the class had attested the will: see PARA 346 ante); *Re Coleman and Jarrom* (1876) 4 ChD 165 at 169, 173 per Jessel MR.

3 As to the date of distribution see PARA 597 post.

4 *Re Winn, Brook v Whitton* [1910] 1 Ch 278 at 286, 289 per Parker J. See also *Singleton v Gilbert* (1784) 1 Cox Eq Cas 68; *Viner v Francis* (1789) 2 Cox Eq Cas 190; *Hill v Chapman* (1791) 3 Bro CC 391; *Davidson v Dallas* (1808) 14 Ves 576. This rule applies to an immediate gift to a class 'or so many of them as shall be living' at a postponed period (*Trelawney v Molesworth* (1701) Colles 163), and to a class described as living at the death of a person who died in the lifetime of the testator (*Lee v Pain* (1844) 4 Hare 201 at 250; *Dimond v Bostock* (1875) 10 Ch App 358), or as living at the date of the will (*Leigh v Leigh* (1854) 17 Beav 605). As to a gift to a class of 'unmarried' persons see *Jubber v Jubber* (1839) 9 Sim 503; *Hall v Robertson* (1853) 4 De GM & G 781 ('unmarried daughters' ascertained at date of codicil); *Blagrove v Coore* (1859) 27 Beav 138 (ascertained at death). Where a fund is left to a class contingently on their attaining 21, the eldest of the class on attaining 21 takes a vested interest in possession in his share, and a contingent interest in the shares of the members of the class who are still under 21: *Re Williams' Settlement, Williams v Williams* [1911] 1 Ch 441. Where the gift is revoked as regards some members of the class, the effect is to increase the shares of the other members: *Watson v Donaldson* [1915] 1 IR 63, Ir CA; and see PARA 464 ante.

5 *Ellison v Airey* (1748) 1 Ves Sen 111; *Bartlett v Hollister* (1757) Amb 334; *Congreve v Congreve* (1781) 1 Bro CC 530; *Devisme v Mello* (1782) 1 Bro CC 537; *Simmons v Vallance* (1793) 4 Bro CC 345; *Middleton v Messenger* (1799) 5 Ves 136; *Walker v Shore* (1808) 15 Ves 122 at 125; *Tebbs v Carpenter* (1816) 1 Madd 290; *Marshall v Bousfield* (1817) 2 Madd 166; *Cooke v Bowen* (1840) 4 Y & C Ex 244; *Moffatt v Burnie* (1853) 18 Beav 211 at 214; *Oppenheim v Henry* (1853) 10 Hare 441; *Browne v Hammond* (1858) John 210 at 212n. See also *Hickling v Fair* [1899] AC 15 at 35, HL, per Lord Davey. Apart from this letting in of additional members, the postponement of the gift does not postpone the time of ascertainment of the class (*Lee v Lee* (1860) 1 Drew & Sm 85 at 87), and other persons who come into existence after the period of distribution are excluded (*Hill v Chapman* (1791) 3 Bro CC 391; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520 at 527, CA). Members of the class need not survive the period of distribution: *Re Wood, Moore v Bailey* (1880) 43 LT 730; *Re Walker, Dunkerly v Hewerdine* [1917] 1 Ch 38. For the meaning of 'period of distribution' see PARA 597 note 1 post.

6 *Weld v Bradbury* (1715) 2 Vern 705; *Shepherd v Ingram* (1764) Amb 448; *Odell v Crone* (1815) 3 Dow 61, HL ('younger children'); *Leake v Robinson* (1817) 2 Mer 363 at 383; *Hutcheson v Jones* (1817) 2 Madd 124; *Harris v Lloyd* (1823) Turn & R 310 at 314; *Armitage v Williams* (1859) 27 Beav 346.

7 *Christopherson v Naylor* (1816) 1 Mer 320; cf *Gowling v Thompson* (1868) LR 11 Eq 366n (where the general principle was displaced); and see PARAS 464 ante, 613 post.

8 *Olney v Bates* (1855) 3 Drew 319; *Browne v Hammond* (1858) John 210 (deciding that the Wills Act 1837 s 33 (see PARA 457 ante) had no application); *Re Harvey's Estate, Harvey v Gillow* [1893] 1 Ch 567; *Re Kinnear, Kinnear v Barnett* (1904) 90 LT 537.

9 Wills Act 1837 s 33(2) (substituted by the Administration of Justice Act 1982 s 19). See further PARAS 459, 467 ante.

10 *Devisme v Mello* (1782) 1 Bro CC 537; *Stanley v Wise* (1788) 1 Cox Eq Cas 432; *Cooke v Bowen* (1840) 4 Y & C Ex 244; *Watson v Watson* (1840) 11 Sim 73; *Swan v Bowden* (1842) 11 LJ Ch 155; *Locker v Bradley* (1842) 5 Beav 593; *Salmon v Green* (1849) 11 Beav 453; *Pattison v Pattison* (1855) 19 Beav 638. The interests of such persons are vested but subject to being divested in quantity by the birth of further members of the class: see eg *Stanley v Wise* (1788) 1 Cox Eq Cas 432; *Baldwin v Rogers* (1853) 3 De GM & G 649. A provision in the final limitation requiring a sole beneficiary to survive the life tenant will not be reflected back into the primary limitation: *Re Stephens, Tomalin v Tomalin's Trustee* [1927] 1 Ch 1, CA.

11 *Parr v Parr* (1833) 1 My & K 647 (to 'devolve' on children of life tenant). There may be a gift over or a substitutionary gift defeating a member's interest: *Pope v Whitcombe* (1827) 3 Russ 124; *Re Miles, Miles v Miles* (1889) 61 LT 359. See also *Re Shaw, Williams v Pledger* (1912) 56 Sol Jo 380.

12 *Re Roberts, Percival v Roberts* [1903] 2 Ch 200 at 202 per Joyce J.

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597. Date of distribution.

The date of distribution¹ may be postponed either by some prior gift, or by the nature of the property given, or by the conditions attached to the gift. Where the gift is postponed to a life estate, the date of distribution is usually, but not necessarily, the determination of the life estate²; but the existence of a mere charge on a fund, for example an annuity charged on it, does not necessarily affect the time at which the class is ascertained³.

If there is a prior life interest determinable on bankruptcy and there is no postponement of payment until the death of the life tenant, the class is fixed at the time of bankruptcy⁴; but, where the limitation over to the class after the life interest postpones payment until the death of the life tenant⁵, or expressly directs the property to be applicable in the same manner as if the life tenant were dead⁶, this extends the class so as to let in those coming into existence before the death.

Where a life interest is determinable on remarriage, and the gift over expressly refers only to the death of the life tenant, but the court construes the gift over as impliedly intended to take effect on the remarriage, it may be that the class of children is to be ascertained at the remarriage, although expressly described as to be ascertained at the death⁷.

Where the property is reversionary, the date of distribution may be postponed until it falls into possession⁸, but there is no postponement in case of a gift of a residue which includes a reversionary interest with other property⁹.

1 An expression such as 'date of distribution' or 'period of distribution' is, strictly speaking, a misnomer; it does not denote the moment when the trustees will distribute the fund, but merely indicates the time when the class of beneficiaries finally closes: see *Re Cockle's Will Trusts*, *Re Pittaway*, *Moreland v Draffen*, *Risdon v Public Trustee* [1967] Ch 690 at 704, [1967] 1 All ER 391 at 394 per Stamp J.

2 *Ayton v Ayton* (1787) 1 Cox Eq Cas 327; *Middleton v Messenger* (1799) 5 Ves 136; *Barnaby v Tassell* (1871) LR 11 Eq 363; *Re Cockle's Will Trusts*, *Re Pittaway*, *Moreland v Draffen*, *Risdon v Public Trustee* [1967] Ch 690, [1967] 1 All ER 391; *Re Deeley's Settlement*, *Batchelor v Russell* [1974] Ch 454, [1973] 3 All ER 1127. Cf *Re Knapp's Settlement*, *Knapp v Vassall* [1895] 1 Ch 91 at 96 per North J. As to a gift to the 'descendants' of two successive life tenants see *Re Roberts*, *Repington v Roberts-Gawen* (1881) 19 ChD 520 at 527, CA, per Jessel MR.

3 *Singleton v Gilbert* (1784) 1 Cox Eq Cas 68; *Hill v Chapman* (1791) 3 Bro CC 391; *Watson v Watson* (1840) 11 Sim 73; *Bortoft v Wadsworth* (1864) 12 WR 523; *Coventry v Coventry* (1865) 2 Drew & Sm 470; *Re Whiteford*, *Inglis v Whiteford* [1903] 1 Ch 889; *Re Hiscoe*, *Hiscoe v Waite* (1883) 48 LT 510; *Gardner v James* (1843) 6 Beav 170 (where there could be no distribution until the death of the surviving annuitant).

4 *Re Smith* (1862) 2 John & H 594 at 600-601; *Re Aylwin's Trusts* (1873) LR 16 Eq 585; *Re Curzon*, *Martin v Perry* (1912) 56 Sol Jo 362.

5 *Brandon v Aston* (1843) 2 Y & C Ch Cas 24 at 30.

6 *Re Bedson's Trusts* (1885) 28 ChD 523, CA.

7 See *Bainbridge v Cream* (1852) 16 Beav 25 (followed in *Stanford v Stanford* (1886) 34 ChD 362 at 366); *Re Tucker*, *Bowchier v Gordon* (1887) 56 LT 118 at 119 (where Stirling J said that he did not understand *Bainbridge v Cream* supra); *Re Dear*, *Helby v Dear* (1889) 61 LT 432 at 434 (where Kay J said that he considered *Bainbridge v Cream* supra to be a reasonable extension of *Luxford v Cheeke* (1683) 3 Lev 125); *Re Crother's Trusts* [1915] 1 IR 53; *Re Warner*, *Watts v Silvey* [1918] 1 Ch 368.

8 *Walker v Shore* (1808) 15 Ves 122 at 125 (followed in *Harvey v Stracey* (1852) 1 Drew 73 at 123).

9 *Hagger v Payne* (1857) 23 Beav 474; *Coventry v Coventry* (1865) 2 Drew & Sm 470.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(i) Time of Ascertainment of Donees/B. CLASS GIFTS/598. The second rule of convenience.

598. The second rule of convenience.

The second rule of convenience deals with the determination of the date of distribution¹ where the gift is of the corpus of property² and is postponed by reason of the conditions attached to it, as where payment is to be made on the attainment by the donee of a specified age³, or on his or her marriage⁴, or in other cases, it appears, where such conditions are of a nature personal to the donees. The rule is as follows: where the postponement of enjoyment is due to conditions attached to the gift, the date of distribution is considered to be reached as soon as the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share, if the class were then not susceptible of increase⁵, and the class is then closed⁶. Thus where there is an immediate gift to a class, to be paid on the members attaining a specified age, the date of distribution is the date of the testator's death, if any member of the

class has then attained that age⁷, and, if not, the time of the first occasion when a member attains that age⁸.

1 For the meaning of 'date of distribution' see PARA 597 note 1 ante.

2 As to gifts of income see PARA 601 post; and as to real estate see PARA 602 post.

3 See the text and notes 7-8 infra. Where, however, a class takes at birth, a gift over on the members failing to attain a specified age does not postpone the period of distribution: *Davidson v Dallas* (1808) 14 Ves 576.

4 *Barrington v Tristram* (1801) 6 Ves 345; *Dawson v Oliver-Massey* (1876) 2 ChD 753 at 756, CA.

5 *Re Emmet's Estate, Emmet v Emmet* (1880) 13 ChD 484 at 490, CA; *Re Bedson's Trusts* (1885) 28 ChD 523 at 526, CA; *Re Knapp's Settlement, Knapp v Vassall* [1895] 1 Ch 91 at 96; Underhill and Strahan's Interpretation of Wills and Settlements (3rd Edn) 77.

6 In accordance with the first rule: see PARA 596 ante.

7 *Picken v Matthews* (1878) 10 ChD 264. See also *Gillman v Daunt* (1856) 3 K & J 48.

8 *Andrews v Partington* (1791) 3 Bro CC 401; *Prescott v Long* (1795) 2 Ves 690; *Hoste v Pratt* (1798) 3 Ves 730; *Whitbread v Lord St John* (1804) 10 Ves 152; *Curtis v Curtis* (1821) 6 Madd 14; *Titcomb v Butler* (1830) 3 Sim 417; *Balm v Balm* (1830) 3 Sim 492; *Blease v Burgh* (1840) 2 Beav 221; *Robley v Ridings* (1847) 11 Jur 813; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197; *Re Knapp's Settlement, Knapp v Vassall* [1895] 1 Ch 91; *Re Chapman's Settlement Trusts* [1978] 1 All ER 1122, [1977] 1 WLR 1163, CA; *Re Clifford's Settlement Trusts, Heaton v Westwater* [1981] Ch 63, [1980] 1 All ER 1013; *Millbank v Millbank* [1982] 79 LS Gaz R 1291; *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1073. The rule is termed 'the rule in *Andrews v Partington*', but in that case Lord Thurlow LC treated the rule as already established, although, as pointed out in *Prescott v Long* supra at 692 per Lord Loughborough, it does not appear what are the cases he referred to. The rule seems, however, to have been applied in *Gilmore v Severn* (1785) 1 Bro CC 582. A child en ventre sa mère when the eldest attains the specified age is included in the class: *Trustees, Executors and Agency Co Ltd v Sleeman* (1899) 25 VLR 187; and see PARA 647 post. Where the gift is to children who attain 21, a child who has attained that age at the date of the will is not excluded (*Re Rayner, Couch v Warner* (1925) 134 LT 141), although in general words of futurity are construed strictly (*Re Walker, Walker v Walker* [1930] 1 Ch 469, CA; and see PARA 538 ante). The rule applies also in the case of settlements: see PARA 599 note 4 post; and SETTLEMENTS vol 42 (Reissue) PARA 926.

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599. Application of the second rule of convenience.

The second rule of convenience¹ is adopted to reconcile inconsistent directions in a will that all the children or other persons comprising the class² are to take, but that the fund is to be divided at a time when the class cannot be ascertained³. The rule is not applied unless it is necessary⁴, and in substance this will only be where the testator has made his testamentary disposition in such terms that he must, or may, be taken to have intended a distribution at a moment which may be anterior to the birth of all the members of the class⁵. In any event, the rule must give way to language sufficiently clear to displace it⁶. Thus it is not applied where the provisions of the will are inconsistent with any right of the first child attaining the specified age or satisfying the conditions as to payment of his share⁷, as, for example, where there is an effective direction, extending beyond the time when a child first attains the specified age or satisfies the conditions, to accumulate income⁸, or to allow maintenance or advancement⁹.

Where the application of the rule would cause the gift to the class, or any other gift in the will connected with it, to fail as being contrary to law (for example, under the rule against perpetuities), and some other construction, such as that the class is ascertained at the

testator's death, is possible under the will¹⁰ by which the gift takes effect, it appears that the rule is not applied but that the alternative construction is adopted¹¹.

The rule may be applied notwithstanding that there is a previous life interest¹², as, for example, where no child is born until after the expiration of the previous interest¹³, unless the testator shows that the expiration of that life interest is intended by him to be the date of distribution¹⁴.

The rule applies both where the gift and direction as to payment are distinct, so that the gift is not contingent¹⁵, and where the gift is contingent on attaining the specified age¹⁶ or other event, or is subject to a gift over in any such event¹⁷.

An analogous rule operates where the date of distribution is the date when the youngest of the class of donees attains a certain age; in such a case the gift is immediate and vested and the class is confined to those in being at the date of the testator's death¹⁸ or, if the gift is subject to intervening life interests, the date of the termination of the last of those life interests¹⁹. The rule does not apply if there is no one in existence at the date of the testator's death who is entitled to a share absolutely vested in interest and possession²⁰.

1 As to the second rule see PARA 598 ante.

2 See PARA 600 post.

3 *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 at 328 per Buckley J; *Re Wernher's Settlement Trusts, Lloyds Bank Ltd v Earl Mountbatten* [1961] 1 All ER 184 at 187, [1961] 1 WLR 136 at 139 per Buckley J; *Re Tom's Settlement, Rose v Evans* [1987] 1 All ER 1081 at 1085, [1987] 1 WLR 1021 at 1025 per Sir Nicholas Browne-Wilkinson V-C. See also *Defflis v Goldschmidt* (1816) 1 Mer 417 at 420 per Grant MR; *Mainwaring v Beevor* (1849) 8 Hare 44 at 49 per Wigram V-C; but see *Mann v Thompson* (1854) Kay 628 at 641 (where Wood V-C appears not to have concurred in this view). The rule has often been criticised. In *Andrews v Partington* (1791) 3 Bro CC 401 at 404, Lord Thurlow LC said that there was no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubted that the same expression meant all the children. See also note 4 infra.

4 *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 at 328 per Buckley J. The rule has been applied to similar gifts to children in a voluntary settlement (*Re Knapp's Settlement, Knapp v Vassall* [1895] 1 Ch 91; *Re Edmondson's Will Trusts, Baron Sandford v Edmondson* [1972] 1 All ER 444, [1972] 1 WLR 183, CA), although by reason of the previous life estate given to the parent it is not normally called into play in the case of a marriage settlement (*Mann v Thompson* (1854) Kay 628 at 642). See SETTLEMENTS vol 42 (Reissue) PARA 926. The rule may be excluded where the income has been divided between two tenants for life: see *Re Faux, Taylor v Faux* (1915) 84 LJ Ch 873; applied in *Re Paul's Settlement Trusts, Paul v Nelson* [1920] 1 Ch 99. For a discussion of the rule and its origin see *Re Chartres, Farman v Barrett* [1927] 1 Ch 466 (where it was applied, although the condition of attaining the age of 21 had become definite only by the release of a power of appointment).

5 *Re Kebty-Fletcher's Will Trusts, Public Trustee v Swan* [1969] 1 Ch 339 at 344, [1967] 3 All ER 1076 at 1079 per Stamp J; *Re Harker's Will Trusts, Kean v Harker* [1969] 3 All ER 1, [1969] 1 WLR 1124 (in both of which cases *Re Davies, Davies v Mackintosh* [1957] 3 All ER 52, [1957] 1 WLR 922 was doubted); *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449 at 454, [1988] 1 WLR 234 at 239-240 per Sir Denis Buckley.

6 See eg *Re Bleckly, Bleckly v Bleckly* [1951] Ch 740 at 750, [1951] 1 All ER 1064 at 1070, CA, per Sir Raymond Evershed MR; *Re Edmondson's Will Trusts, Baron Sandford v Edmondson* [1972] 1 All ER 444, [1972] 1 WLR 183, CA (where the words 'whenever born' in the deed of appointment were held to exclude the rule); *Re Tom's Settlement, Rose v Evans* [1987] 1 All ER 1081, [1987] 1 WLR 1021 (where a specific reference to the period during which beneficiaries must be born was held to exclude the rule). The rule is not, however, excluded by the fact that the class is described as 'all' or 'all and every' the children of a person (*Andrews v Partington* (1791) 3 Bro CC 401; *Prescott v Long* (1795) 2 Ves 690), nor do words of futurity such as 'hereafter to be born' necessarily exclude the rule (*Re Wernher's Settlement Trusts, Lloyds Bank Ltd v Earl Mountbatten* [1961] 1 All ER 184, [1961] 1 WLR 136 (words related to period between date of deed and date of distribution); *Re Chapman's Settlement Trusts, Jones v Chapman* [1978] 1 All ER 1122, [1977] 1 WLR 1163, CA ('now born or who shall be born hereafter')).

7 Cf *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62; *Macculloch v Anderson* [1904] AC 55 at 61, HL.

8 *Watson v Young* (1885) 28 ChD 436; *Re Pilkington, Pilkington v Pilkington* (1892) 29 LR Ir 370; *Re Stephens, Kilby v Betts* [1904] 1 Ch 322; *Re Stevens, Trustees, Executors and Agency Co Ltd v Teague* [1912] VLR 194 at 201-202; *Re Watt's Will Trusts* [1936] 2 All ER 1555. This may not be the case where the direction for accumulation is ineffective owing to the right of beneficiaries to determine it and take the property free from

accumulation: *Curtis v Curtis* (1821) 6 Madd 14; *Coventry v Coventry* (1865) 2 Drew & Sm 470. See also PARA 437 ante.

9 *Gardner v James* (1843) 6 Beav 170; *Bateman v Foster* (1844) 1 Coll 118 at 126; *Mainwaring v Beevor* (1849) 8 Hare 44; *Iredell v Iredell* (1858) 25 Beav 485; *Armitage v Williams* (1859) 27 Beav 346; *Bateman v Gray* (1868) LR 6 Eq 215 (advancement out of 'vested or presumptive shares' relied on) (followed in *Re Courtenay*, *Pearce v Foxwell* (1905) 74 LJ Ch 654; but doubted and not followed in *Re Deloitte*, *Griffiths v Allbeury* [1919] 1 Ch 209, CA). See also *Titcomb v Butler* (1830) 3 Sim 417 (power to allow maintenance insufficient); *Mower v Orr* (1849) 7 Hare 473 at 477; *Hagger v Payne* (1857) 23 Beav 474 at 479; *Gimblett v Purton* (1871) LR 12 Eq 427 at 430 (power of advancement relating to presumptive shares only); *Re Henderson's Trusts*, *Schreiber v Baring* [1969] 3 All ER 769, [1969] 1 WLR 651, CA (power of advancement relating to vested presumptive shares).

10 As to this rule in cases of ambiguous construction see PARA 550 ante; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1024.

11 *Elliott v Elliott* (1841) 12 Sim 276 (where there was a gift to children of E, as and when attaining 22, with a provision for interest in the meantime, and Shadwell V-C saw no objection to holding the class to be ascertained at the testator's death). See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1073. *Elliott v Elliott* supra was explained, as decided on the ground stated in the text, in *Mainwaring v Beevor* (1849) 8 Hare 44 at 48 and *Re Wenmoth's Estate*, *Wenmoth v Wenmoth* (1887) 37 ChD 266 at 270; and it was followed in *Re Coppard's Estate*, *Howlett v Hodson* (1887) 35 ChD 350. See also *Re Hobson's Will*, *Hobson v Sharp* [1907] VLR 724 at 730. Cf the cases as to gifts of income cited in PARA 601 note 6 post. However, *Elliott v Elliott* supra has been much criticised: see *Re Pilkington*, *Pilkington v Pilkington* (1892) 29 LR Ir 370 at 376. See also *Re Mervin*, *Mervin v Crossman* [1891] 3 Ch 197 at 203-204 (where *Elliott v Elliott* supra was supported on account of the gift of interest; but this is open to question as the gift of interest would only make the gift of principal a vested and not a contingent gift, and would not alter the date of distribution); *Re Barker*, *Capon v Flick* (1905) 92 LT 831; *Re Ransome's Will Trusts*, *Moberley v Ransome* [1957] Ch 348, [1957] 1 All ER 690. *Re Coppard's Estate*, *Howlett v Hodson* supra was not intended to go beyond *Elliott v Elliott* supra (*Re Mervin*, *Mervin v Crossman* supra), and, in so far as it does so, ought not to be followed (*Re Stevens*, *Clark v Stevens* (1896) 40 Sol Jo 296).

12 *Clarke v Clarke* (1836) 8 Sim 59; *Re Emmet's Estate*, *Emmet v Emmet* (1880) 13 ChD 484, CA (in both of which cases no children had attained the specified age at the expiration of the previous interest).

13 *Re Bleckly*, *Bleckly v Bleckly* [1951] Ch 740, [1951] 1 All ER 1064, CA. See also *Robley v Ridings* (1847) 11 Jur 813.

14 *Kevern v Williams* (1832) 5 Sim 171 (followed in *Berkeley v Swinburne* (1848) 16 Sim 275 at 285-286; and explained in *Re Emmet's Estate*, *Emmet v Emmet* (1880) 13 ChD 484, CA (cited in PARA 598 note 5 ante)).

15 *Andrews v Partington* (1791) 3 Bro CC 401 (explained in *Re Mervin*, *Mervin v Crossman* [1891] 3 Ch 197 at 203 per Stirling J).

16 *Whitbread v Lord St John* (1804) 10 Ves 152; *Balm v Balm* (1830) 3 Sim 492; *Locke v Lamb* (1867) LR 4 Eq 372; *Gimblett v Purton* (1871) LR 12 Eq 427.

17 *Barrington v Tristram* (1801) 6 Ves 345.

18 *Re Manners*, *Public Trustee v Manners* [1955] 3 All ER 83, [1955] 1 WLR 1096.

19 *Smith v Jackson* (1823) 1 LJOS Ch 231.

20 *Re Ransome's Will Trusts*, *Moberley v Ransome* [1957] Ch 348, [1957] 1 All ER 690 (gift to such of R's children as should be living on the youngest of R's children attaining 21).

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600. Classes subject to the rules.

The rules of convenience¹ apply to a gift to a class of children whether the parent is the testator or any other person, alive or dead², and, it appears, to any other description of a class³ which,

in the context and circumstances, does not point out some other mode of ascertaining the class⁴. The rules are applicable even where the class is described as 'begotten or to be begotten', 'born or to be born' or in like words⁵, and no future period is fixed by the will⁶, in which case the words in question are held to provide for the birth of children between the making of the will and the testator's death⁷. The rules are also applicable where the gift is postponed to a life interest given to a named person who by these rules takes as a member of the class⁸.

1 As to the rules of convenience see PARAS 595-598 ante.

2 *Viner v Francis* (1789) 2 Cox Eq Cas 190.

3 Eg grandchildren (*Mainwaring v Beevor* (1849) 8 Hare 44; *Wetherell v Wetherell* (1863) 1 De GJ & Sm 134 ('grandchildren and great-grandchildren' of A and B); *Coventry v Coventry* (1865) 2 Drew & Sm 470; *Gimblett v Purton* (1871) LR 12 Eq 427); cousins (*Baldwin v Rogers* (1853) 3 De GM & G 649); issue (*Re Deeley's Settlement, Batchelor v Russell* [1974] Ch 454, [1973] 3 All ER 1127; *Re Edmondson's Will Trusts, Baron Sandford v Edmondson* [1972] 1 All ER 444, [1972] 1 WLR 183, CA; *Re Cockle's Will Trusts, Re Pittaway, Moreland v Draffen, Risdon v Public Trustee* [1967] Ch 690, [1967] 1 All ER 391); descriptions by other grades of relationship (*Baldwin v Rogers* supra at 656 per Turner LJ); and generally, it appears, descriptions of any fluctuating body (*Re Laffan and Downes' Contract* [1897] 1 IR 469 at 473; *Re Smith, Johnson v Bright-Smith* [1914] 1 Ch 937). See also CHARITIES vol 8 (2010) PARA 62; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005.

4 As to gifts to 'next of kin' of any person see PARA 604 post; and see generally paras 591-592 ante.

5 *Sprackling v Ranier* (1761) 1 Dick 344; *Whitbread v Lord St John* (1804) 10 Ves 152; *Gilbert v Boorman* (1805) 11 Ves 238; *Clarke v Clarke* (1836) 8 Sim 59; *Butler v Lowe* (1839) 10 Sim 317; *Dias v De Livera* (1879) 5 App Cas 123 at 134, PC.

6 *Scott v Earl of Scarborough* (1838) 1 Beav 154 at 168 (where, however, the gift was to children born 'during the lifetime of their respective parents' so that children born after the date of distribution were let in); *Re Wernher's Settlement Trusts, Lloyds Bank Ltd v Earl Mountbatten* [1961] 1 All ER 184, [1961] 1 WLR 136. See also PARA 599 note 6 ante.

7 *Storrs v Benbow* (1833) 2 My & K 46 at 48; *Dias v De Livera* (1879) 5 App Cas 123 at 135, PC. Cf para 602 note 7 post (real estate).

8 *Elmsley v Young* (1835) 2 My & K 780; *King v Tootel* (1858) 25 Beav 23; *Reay v Rawlinson* (1860) 29 Beav 88; *Almack v Horn* (1863) 1 Hem & M 630. See also the cases as to next of kin cited in PARA 604 note 2 post.

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601. Gifts subject to the rules.

The rules of convenience¹ apply to gifts of the corpus of personal estate², or of a mixed fund of real and personal estate³. In the case of gifts of income only of such property, or of sums payable at intervals⁴, the class taking any particular payment is normally to be ascertained so as to let in all members coming into existence before the time for that payment⁵, and the class, it appears, is not to be closed finally for all subsequent payments at the time when the right to receive income first accrues to any member of the class, except in cases where other considerations require it⁶.

1 As to the rules of convenience see PARA 595 et seq ante.

2 Gifts of real estate, or a mixed fund of real and personal estate, held on trust for conversion and investment are subject to the rules, if the doctrine of conversion applies: *Hoste v Pratt* (1798) 3 Ves 730; *Re*

Mervin, Mervin v Crossman [1891] 3 Ch 197. The doctrine of conversion, whereby land held by trustees subject to a trust for sale is regarded as personal property, has been abolished, except where the trust for sale was created by the will of a testator who died before 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is, however, not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq.

3 See *Andrews v Partington* (1791) 3 Bro CC 401 (residue); *Dawson v Oliver-Massey* (1876) 2 ChD 753, CA; *Re Emmet's Estate, Emmet v Emmet* (1880) 13 ChD 484, CA.

4 *Re Latham, Seymour v Bolton* [1901] WN 248 (annuity to children attaining 21; two who had attained 21 alone entitled to payment).

5 *Re Wenmoth's Estate, Wenmoth v Wenmoth* (1887) 37 ChD 266 (where Chitty J held that the rule in *Andrews v Partington* (1791) 3 Bro CC 401 (see PARA 598 ante) did not apply to gifts of income). The decision in *Re Wenmoth's Estate, Wenmoth v Wenmoth* supra was criticised and explained by Buckley J in *Re Stephens, Kilby v Betts* [1904] 1 Ch 322, but these criticisms have, however, been dissented from as unnecessary (*Re Carter, Walker v Litchfield* (1911) 30 NZLR 707 at 723, NZ CA), and *Re Wenmoth's Estate, Wenmoth v Wenmoth* supra was followed in *Re Ward's Will Trusts, Ward v Ward* [1965] Ch 856, [1964] 3 All ER 442.

6 *Re Stephens, Kilby v Betts* [1904] 1 Ch 322. In *Re Powell, Crosland v Holliday* [1898] 1 Ch 227 (gift of real estate), the class was thus closed, but, if the ordinary rule had been applied, a subsequent gift would have been void under the rule against perpetuities. See the comments made in this case on *Re Wenmoth's Estate, Wenmoth v Wenmoth* (1887) 37 ChD 266. In so far as *Re Powell, Crosland v Holliday* supra purports to lay down a general rule of construction, it is dissented from in *Re Carter, Walker v Litchfield* (1911) 30 NZLR 707, NZ CA, and in *Re Ward's Will Trusts, Ward v Ward* [1965] Ch 856, [1964] 3 All ER 442 (where *Re Wenmoth's Estate, Wenmoth v Wenmoth* supra was followed). See also *Mogg v Mogg* (1815) 1 Mer 654, referred to as an authority as to the difference between gifts of corpus and of income in *Re Wenmoth's Estate, Wenmoth v Wenmoth* supra.

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602. Gifts of real estate alone.

If a gift of real estate alone to a class is construed as being immediate on the testator's death, this is the time when the class is ascertained if any members of the class have then come into being¹. If no members of the class have then come into being, the gift must take effect as an executory devise, and all members, whenever born, will be let in². A devise, not otherwise postponed, to 'all and every' the children of a person is construed as immediate and the class is ascertained at the testator's death³.

As future interests can be equitable only⁴, limitations not taking effect at the testator's death (including limitations to a class which is liable to fluctuate) must take effect, if at all, as equitable executory devises⁵. Where there is an executory devise to a class of children who attain a specified age, the same rule applies to devises as in the case of personalty and, unless the will points plainly to a contrary intention, children who are born after a child attains that age are excluded⁶.

In a gift not otherwise postponed, a description of a class of children as 'born and to be born', or 'begotten and to be begotten', may cause the gift to take effect as an executory devise, and accordingly all the children, whether in existence at the testator's death or otherwise, may take under the gift⁷.

In an executory devise to a class on the death of any person or on any other postponed event which does not import contingency in the class, the donees are prima facie ascertained so as to let in all who come into existence and satisfy the description before that event⁸. In a gift to a class not postponed otherwise than by the fact that the description may refer to persons yet to

come into existence, and that no member of the class has come into existence at the testator's death, all the members of the class coming into existence at any time are let in⁹.

1 *Singleton v Gilbert* (1784) 1 Cox Eq Cas 68; *Doe d Thwaites v Over* (1808) 1 Taunt 263; *Crone v Odell* (1811) 1 Ball & B 449 at 458 (affd (1815) 3 Dow 61, HL); *Re Johnson, Danily v Johnson* (1893) 68 LT 20 (acceleration of ascertainment by revocation of prior interest); *Shep Touch* (8th Edn) 436. The rule was applied to gifts of income in *Re Powell, Crosland v Holliday* [1898] 1 Ch 227 at 231: see PARA 601 note 6 ante.

2 *Weld v Bradbury* (1715) 2 Vern 705.

3 *Scott v Harwood* (1821) 5 Madd 332.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 165. As to a devise to a parent and his children or issue see PARA 673 et seq post.

5 See REAL PROPERTY vol 39(2) (Reissue) PARA 173.

6 *Re Canney's Trusts, Mayers v Strover* (1910) 101 LT 905; *Re Curzon, Martin v Perry* (1912) 56 Sol Jo 362; *Re Chapman, Charley v Lewis* (1922) 56 ILT 32; *Re Edmondson's Will Trusts, Baron Sandford v Edmondson* [1972] 1 All ER 444, [1972] 1 WLR 183, CA (rule applicable to a settlement of realty) (disapproving *Blackman v Fysh* [1892] 3 Ch 209, CA).

7 *Mogg v Mogg* (1815) 1 Mer 654 at 690 (explained in 3 Preston's Conveyancing (3rd Edn) 555); *Gooch v Gooch* (1853) 3 De GM & G 366 (where, however, the devises were devises of rents and profits only). It appears that the rule referring such words to the interval between the date of the will and the testator's death, which is applicable to personal estate (see PARA 600 text and note 7 ante), does not apply to gifts of income of real estate: see *Dias v De Livera* (1879) 5 App Cas 123 at 132, PC. See also *Cook v Cook* (1706) 2 Vern 545 (where, it appears, 'begotten' was construed to include 'to be begotten'; as to this construction see PARA 620 post); *Eddowes v Eddowes* (1862) 30 Beav 603; but see *Woodhouse v Herrick* (1855) 1 K & J 352 at 358, 360.

8 *Crone v Odell* (1811) 1 Ball & B 449 at 459; *Browne v Hammond* (1858) John 210 at 212n; *Holland v Wood* (1870) LR 11 Eq 91 at 96; *Re Canney's Trusts, Mayers v Strover* (1910) 101 LT 905.

9 *Shepherd v Ingram* (1764) Amb 448.

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603. Gift of intermediate income.

Where a gift carrying intermediate income, such as a gift of residuary personal estate¹, is made to a contingent class, then, if members of the class attain a vested interest on coming into existence, whether subject or not to being diminished in any event, the members for the time being in existence share the income². If, however, members attain a vested interest on attaining a certain age, or on satisfying some other description or condition, a member of the class attaining a vested interest takes only the income of the share to which he would be entitled if the other members of the class for the time being in existence³ had attained vested interests⁴. If, however, a gift not carrying intermediate income is made to such a class, the members of the class whose interests are transmissible for the time being take the whole income⁵ unless the testator sufficiently indicates that the income is to be divisible equally between all the members of the class, as by including a power of maintenance⁶.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 502.

2 *Shepherd v Ingram* (1764) Amb 448. In *Re Ransome's Will Trusts, Moberley v Ransome* [1957] Ch 348, [1957] 1 All ER 690, a beneficiary with a contingent interest only was not entitled to income after the permitted period of accumulation by virtue of the Trustee Act 1925 s 31(1)(ii) (see CHILDREN AND YOUNG PERSONS vol 5(3)).

(2008 Reissue) PARA 63), because a contrary intention within s 69(2) (see TRUSTS vol 48 (2007 Reissue) PARA 603) was disclosed by the existence of an express direction to accumulate: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1126. Where the law intervenes to prevent further accumulations, the income will in general pass to residue or on an intestacy, as the case may be: *Re Ransome's Will Trusts*, *Moberley v Ransome* supra.

3 On the birth of another child, and the consequent probable enlargement of the class, the child is not entitled to participate in income which has arisen prior to his birth: *Mills v Norris* (1800) 5 Ves 335; *Scott v Earl of Scarborough* (1838) 1 Beav 154.

4 *Re Holford*, *Holford v Holford* [1894] 3 Ch 30, CA; *Re Jeffery*, *Arnold v Burt* [1895] 2 Ch 577; *Re Faux*, *Taylor v Faux*, as reported in [1915] WN 135; *Re Maber*, *Ward v Maber* [1928] Ch 88; *Re King*, *Public Trustee v Aldridge* [1928] Ch 330.

5 *Re Averill*, *Salsbury v Buckle* [1898] 1 Ch 523; *Re Walmsley's Settled Estates* (1911) 105 LT 332. See also *Stone v Harrison* (1846) 2 Coll 715 (sum of consols).

6 *Re Woodiwiss' Will Trusts*, *Robotham v Burn* (1959) 109 L Jo 154. In *Re Stevens*, *Stevens v Stevens* [1915] 1 Ch 429, there was, after the death of the life tenant, a trust of 'as well the income as the corpus' for children attaining 21 or marrying; each child was entitled to a share of rents from the death of the life tenant as and when he became entitled to a corresponding share of the corpus, with maintenance in the meantime.

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604. Gifts to next of kin.

Whatever may be the time of distribution, where there is a gift to a testator's next of kin, without more, the class prima facie has to be ascertained¹ as at the testator's death², and, where there is a gift to the next of kin of any other person, the class prima facie has to be ascertained at that person's death, if he survived the testator³, and, if he did not, the class consists of those of the next of kin living at the testator's death⁴. In a gift to a class of next of kin of the testator (or his nearest relatives or a similar class) living at a future date of distribution, the entire class is ascertained as at the testator's death, but only those of the class who survive to the date of distribution may take⁵.

Where the gift was to the testator's next of kin entitled by virtue of the former Statutes of Distribution⁶, even though they were to be so entitled at some future time⁷, the class was prima facie ascertained as at the testator's death⁸. The context might, however, require them to be ascertained as if the testator had died at some other date⁹. The same rules appear to apply to the ascertainment of persons entitled under the provisions as to succession on intestacy¹⁰ now in force¹¹.

1 As to the construction of gifts to next of kin generally see PARAS 632-633 post; and as to the ascertainment of a class of next of kin directed to be ascertained on the assumption that a person died 'without having been married' see SETTLEMENTS vol 42 (Reissue) PARA 936.

2 *Wharton v Barker* (1858) 4 K & J 483 at 488 per Wood V-C. See also *Seifferth v Badham* (1846) 9 Beav 370; *Say v Creed* (1847) 5 Hare 580 at 587; *Ware v Rowland* (1848) 2 Ph 635; *Bird v Luckie* (1850) 8 Hare 301 (where the sole next of kin took a prior life estate); *Gorbell v Davison*, *Gorbell v Forrest* (1854) 18 Beav 556 (two of class had prior life interests); *Moss v Dunlop* (1859) John 490; *Lee v Lee* (1860) 1 Drew & Sm 85 (one had prior interest); *Harrison v Harrison* (1860) 28 Beav 21; *Re Ford*, *Patten v Sparks* (1895) 72 LT 5, CA; *Re Maher*, *Maher v Toppin* [1909] 1 IR 70, Ir CA. In *Re Clanchy's Will Trusts*, *Lynch v Edwards* [1970] 2 All ER 489, CA, the terms of the will required that the class be ascertained at a later date, when the nearest in blood to the testator then living took. In *Re Shield*, *Bache v Shield* [1974] Ch 373, [1974] 2 All ER 274, a composite class of the testator's and his wife's relations was held to be ascertained at the widow's death.

3 *Philps v Evans* (1850) 4 De G & Sm 188; *Gundry v Pinniger* (1852) 1 De GM & G 502. See also *Jacobs v Jacobs* (1853) 16 Beav 557 (criticised in *Re Kilvert, Midland Bank Executor and Trustee Co Ltd v Kilvert* [1957] Ch 388, [1957] 2 All ER 146).

4 *Philps v Evans* (1850) 4 De G & Sm 188; *Wharton v Barker* (1858) 4 K & J 483 at 502; *Re Philps' Will* (1868) LR 7 Eq 151 ('heirs' construed as next of kin). For a contrary intention see *Re Rees, Williams v Davies* (1890) 44 ChD 484.

5 *Spink v Lewis* (1791) 3 Bro CC 355; *Re Nash, Prall v Bevan* (1894) 71 LT 5, CA (followed in *Re Winn, Brook v Whitton* [1910] 1 Ch 278 ('next of kin . . . living at the time of the trusts failing')). See, however, *Re Tuckett's Will Trusts, Williams v National Provincial Bank Ltd* (1967) 111 Sol Jo 811 (where the testatrix's next of kin were determined as at the future date of distribution which was the date of death of the testatrix's only son).

6 As to the Statutes of Distribution see PARA 632 post.

7 See *Re Winn, Brook v Whitton* [1910] 1 Ch 278 at 289 (where Parker J explained that in such cases the ordinary rule which would have ascertained the class at the time referred to is rebutted, because of the necessity for every person who claims under the gift to prove his title by virtue of the statute).

8 *Doe d Garner v Lawson* (1803) 3 East 278; *Markham v Ivatt* (1855) 20 Beav 579; *Bullock v Downes* (1860) 9 HL Cas 1; *Mortimore v Mortimore* (1879) 4 App Cas 448, HL; *Re Wilson, Wilson v Batchelor* [1907] 1 Ch 450 (affd [1907] 2 Ch 572, CA).

9 *Wharton v Barker* (1858) 4 K & J 483; *Clowes v Hilliard* (1876) 4 ChD 413; *Sturge and Great Western Rly Co* (1881) 19 ChD 444; *Re McFee, McFee v Toner* (1910) 103 LT 210; *Re Helsby, Neate v Bozie* (1914) 84 LJ Ch 682; *Re Mellish, Day v Withers* [1916] 1 Ch 562; *Hutchinson v National Refuges for Homeless and Destitute Children* [1920] AC 795, HL; *Re Krawitz's Will Trusts, Krawitz v Crawford* [1959] 3 All ER 793 at 797, [1959] 1 WLR 1192 at 1196.

10 See the Administration of Estates Act 1925 s 46 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq.

11 See *Re Bridgen, Chaytor v Edwin* [1938] Ch 205 at 209, [1937] 4 All ER 342 at 344; *Re Krawitz's Will Trusts, Krawitz v Crawford* [1959] 3 All ER 793, [1959] 1 WLR 1192. In *Re Mitchell, Hatton v Jones* [1954] Ch 525, [1954] 2 All ER 246, the Crown took under a gift to the person or persons who would have been entitled on the death of the testator's widow intestate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 613.

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605. Shares in which next of kin take.

Where there was a gift to next of kin under or according to the former Statutes of Distribution¹, they took as tenants in common in the shares fixed by the statutes if either the will in terms referred to the statutory mode of distribution², or was silent on the subject³; but, if, for example, the testator directed that they were to take equally, and did not refer to the Statutes of Distribution, effect was given to the direction⁴. A gift to persons entitled beneficially under the provisions as to succession on intestacy now in force⁵ has, it seems, a similar effect⁶.

Where the gift is to next of kin excluding certain persons, the next of kin are ascertained as if these persons were dead at the time in question, but without any other difference from the above rule⁷.

1 As to the Statutes of Distribution see PARA 632 post.

2 *Holloway v Radcliffe* (1857) 23 Beav 163 ('equally as if the same had to be paid under the statute'; 'equally' rejected); *Fielden v Ashworth* (1875) LR 20 Eq 410 at 412 ('share and share alike, as the law directs'; 'share and share alike' disregarded). Cf *Re Taylor, Taylor v Ley* (1885) 52 LT 839, CA.

3 A gift to the persons entitled under the statutes gives a description not only of the persons, but of their interests: *Martin v Glover* (1844) 1 Coll 269 at 272.

4 *Re Richards, Davies v Edwards* [1910] 2 Ch 74 at 76 per Swinfen Eady J (following *Mattison v Tanfield* (1840) 3 Beav 131 at 132).

5 See PARA 604 note 10 ante.

6 See *Re Bridgen, Chaytor v Edwin* [1938] Ch 205, [1937] 4 All ER 342 (direction to divide equally among relations). For a case where the persons entitled took equally as named individuals and as joint tenants see *Re Krawitz's Will Trusts, Krawitz v Crawford* [1959] 3 All ER 793, [1959] 1 WLR 1192.

7 *White v Springett* (1869) 4 Ch App 300; *Re Taylor, Taylor v Ley* (1885) 52 LT 839, CA; and see *Lee v Lee* (1860) 1 Drew & Sm 85; *Lindsay v Ellicott* (1876) 46 LJ Ch 878.

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C. SURVIVORSHIP

606. Usual meanings of 'survive'.

The word 'survive' and its derivatives ordinarily refer to the longest in duration of lives running concurrently¹; they may, however, refer not to concurrent lives but to the fact of living to and after a named event or death². There is no rule of construction as to the period to which survivorship refers apart from a context³. The question must in every case be answered by applying ordinary principles of construction to the particular language used and having regard to any relevant surrounding circumstances⁴. The language used must be construed in its natural sense unless the context shows that this would defeat the testator's intention⁵, and the mere fact that, so construed, the will might in certain possible, or even probable, circumstances produce results which seem fanciful or even harsh is not a sufficient ground for adopting another interpretation⁶. Although this fact may raise doubts whether the construction fulfils the testator's intention, doubts are not enough; it must be possible to discover from the language used what the intention was, that is, that the testator intended to use 'survive' in some secondary sense⁷.

1 *Re Delany, Delany v Delany* (1895) 39 Sol Jo 468. See also *Gee v Liddell* (1866) LR 2 Eq 341 at 344 per Lord Romilly MR ('the person to survive must be living at the death of the person who is to be survived'); *Re Heath, Jackson v Norman* (1904) 48 Sol Jo 416; *Re Bourke's Will Trusts, Barclays Bank Trust Co Ltd v Canada Permanent Trust Co* [1980] 1 All ER 219, [1980] 1 WLR 539 (where 'surviving issue' meant surviving children, rather than surviving issue of all degrees).

2 *Re Clark's Estate* (1864) 3 De GJ & Sm 111; *Mellor v Daintree* (1886) 33 ChD 198 at 210; *Re Sing, Sing v Mills* [1914] WN 90. For a discussion of the uses of the word 'survive' and of these cases see *Knight v Knight* (1912) 14 CLR 86; *Re Sadler, Furniss v Cooper* (1915) 60 Sol Jo 89 ('with benefit of survivorship in the same family'). 'Surviving' means prima facie 'living both to and after a particular point of time': see *Elliott v Lord Joicey* [1935] AC 209 at 218, HL; *Re Hodgson, Hodgson v Gillett* [1952] 1 All ER 769; *Re Allsop, Cardinal v Warr* [1968] Ch 39 at 45-46, 48, 51, [1967] 2 All ER 1056 at 1057-1058, 1059, 1061, CA, per curiam. Where two events were specified, 'surviving' was held to mean living at the happening of the last of those two: *Re Castle, Public Trustee v Floud* [1949] Ch 46, [1948] 2 All ER 927; cf *Re Gargan, Governor & Co of Bank of Ireland v A-G* [1962] IR 264 (where it was held that, in order to survive two events, the beneficiary had to be alive at the occurrence of the first). But see also *Blech v Blech* [2001] All ER (D) 141 (Dec), [2002] WTLR 483, where a gift to such children of the testatrix's son 'as shall survive me' was construed, having regard to the surrounding circumstances and relevant context, so as to include children born after the testatrix's death. As to the effect of clauses of accruer see PARA 694 post.

3 *Re Benn, Benn v Benn* (1885) 29 ChD 839 at 844, CA, per Cotton LJ; *Inderwick v Tatchell* [1903] AC 120 at 123, HL; *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 754.

4 *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 754. See also *Re Allsop, Cardinal v Warr* [1968] Ch 39, [1967] 2 All ER 1056, CA (where 'as shall survive me and attain the age of 21 years' was read on the construction of the whole will as 'as shall (in the case of those born in my lifetime) survive me and in any case attain the age of 21 years'). Cf *Re Riley's Will Trusts, Barclays Bank Ltd v Riley* (1964) 108 Sol Jo 174, CA (where 'survivors of my said children and their issue' was read on the construction of the whole will not to impose survivorship so far as the issue were concerned).

5 *Gilmour v MacPhillamy* [1930] AC 712, PC; *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 754.

6 *Wake v Varah* (1876) 2 ChD 348, CA; *Auger v Beaudry* [1920] AC 1010, PC; *Gilmour v MacPhillamy* [1930] AC 712, PC; *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 754.

7 See the cases cited in note 6 supra.

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607. Use of words such as 'survivors' otherwise than in a strict sense.

'Survivor' and similar words may be used in other than the strict sense. Thus, in a set of dispositions in favour of several persons and their children or issue, the words may be used in a sense in which the element of survivorship involves not a survivorship between the named persons, but the subsistence of a line of children or issue, or of vested estates and interests¹. Alternatively, they may be used as meaning 'others'², but, where it is proper to adopt a secondary meaning, a meaning which imports some kind or element of survivorship (for example survival by issue) is to be preferred to construing 'survivors' as equivalent to 'others'³. Such words may receive one of the constructions mentioned above⁴ where the context requires it, but not otherwise⁵. Thus, after a gift to several children in tail, a gift over on the death of any of them without issue indefinitely to the 'survivors' in tail is construed as to the 'others', creating cross-remainders⁶. Where the gift is to several persons equally for their respective lives and after the death of any to his children, but, if any die without children, to the survivors for life⁷, with remainder to their children, without more⁸, then as a rule only children of survivors in the ordinary sense can take under the gift over⁹. Where, however, to similar gifts there is added a limitation over if all the tenants for life die without children, then the children of a predeceased life tenant may participate in the share of one who dies without children after their parent¹⁰.

1 *Re Friend's Settlement, Cole v Allcot* [1906] 1 Ch 47 at 54 (case of a deed).

2 *Wilmot v Wilmot* (1802) 8 Ves 10; *Leake v Robinson* (1817) 2 Mer 363 at 394; *Smith v Osborne* (1857) 6 HL Cas 375 at 393; *O'Brien v O'Brien* [1896] 2 IR 459, 1r CA; *Powell v Hellicar* [1919] 1 Ch 138.

3 *Waite v Littlewood* (1872) 8 Ch App 70; *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 755.

4 See the text to notes 1-2 supra.

5 *Davidson v Dallas* (1808) 14 Ves 576 at 578 (where the construction 'others' is described as a forced construction); *Winterton v Crawford* (1830) 1 Russ & M 407. See also *Cromek v Lumb* (1839) 3 Y & C Ex 565; *Leeming v Sherratt* (1842) 2 Hare 14 at 24; *Stead v Platt* (1853) 18 Beav 50; *Mann v Thompson* (1854) Kay 628 at 644; *Greenwood v Percy* (1859) 26 Beav 572; *Nevill v Boddam* (1860) 28 Beav 554 at 559; *De Garagnol v Liardet* (1863) 32 Beav 608.

6 *Doe d Watts v Wainewright* (1793) 5 Term Rep 427; *Smith v Osborne* (1857) 6 HL Cas 375. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. The position is similar if the limitations prior to the gift over are to a number of persons for life, with remainder to their sons and daughters in strict settlement: *Cole v Sewell* (1848) 2 HL Cas 186 at 227; *Re Tharp's Estate* (1863) 1 De GJ & Sm 453. Subject to certain exceptions, new settlements created on or after 1 January 1997 are not subject to the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; REAL PROPERTY vol 39(2) (Reissue) PARA 65; and SETTLEMENTS vol 42 (Reissue) PARA 675.

7 If in such a case the survivors take absolutely, there may be ground for reading 'survivor', in respect of the last, as 'longest liver', as in *Maden v Taylor* (1876) 45 LJ Ch 569, followed in *Davidson v Kimpton* (1881) 18 ChD 213; *Re Roper's Estate*, *Morrell v Gissing* (1889) 41 ChD 409. Cf *King v Frost* (1890) 15 App Cas 548 at 553; *Re Mortimer*, *Griffiths v Mortimer* (1885) 54 LJ Ch 414; *Askew v Askew* (1888) 57 LJ Ch 629.

8 Eg a further gift over: see the text to note 10 infra; and PARA 608 post.

9 *Re Ustick* (1866) 35 Beav 338; *Re Horner's Estate*, *Pomfret v Graham* (1881) 19 ChD 186; *Re Dunlevy's Trusts* (1882) 9 LR Ir 349, Ir CA; *Re Rubbins*, *Gill v Worrall* (1898) 79 LT 313, CA; *Olphert v Olphert* [1903] 1 IR 325; *Garland v Smyth* [1904] 1 IR 35, Ir CA. See also *Re Bowman*, *Re Lay*, *Whytehead v Boulton* (1889) 41 ChD 525 at 531. A contrary intention in favour of issue may be shown by a substitutional gift, but 'survivors' may nevertheless have its ordinary meaning (*Willets v Willets* (1848) 7 Hare 38; *Blundell v Chapman* (1864) 33 Beav 648; *Re Hobson*, *Barwick v Holt* [1912] 1 Ch 626 at 633); and without construing 'survivors' as 'others', 'their issue' may mean the issue not of surviving children only, but of all the children (*Re Corbett's Trusts* (1860) John 591 at 598 per Wood V-C; *Re Bowman*, *Re Lay*, *Whytehead v Boulton* supra at 529). In *Hodge v Foot* (1865) 34 Beav 349, 'survivors' was held to mean 'others'.

10 *Re Bowman*, *Re Lay*, *Whytehead v Boulton* (1889) 41 ChD 525 at 531 per Kay J; *Harrison v Harrison* [1901] 2 Ch 136 at 142 per Cozens-Hardy J; *O'Brien v O'Brien* [1896] 2 IR 459 at 495, Ir CA. The inference made from the gift over, in pursuance of the presumption against intestacy (see PARAS 546-548 ante), is that the objects of the testator's bounty previously named take between them the entire estate in every state of circumstances consistent with the gift over not taking effect: *O'Brien v O'Brien* supra at 466. Children of predeceased tenants for life do not take merely on account of a direction that accruing shares are to be taken in the same manner as original shares: see *Harrison v Harrison* supra at 142-144 (disapproving the proposition stated on this point in *Re Bowman*, *Re Lay*, *Whytehead v Boulton* supra at 531); *Inderwick v Tatchell*, *Tatchell v Tatchell*, *Inderwick v Inderwick* [1901] 2 Ch 738, CA (affd [1903] AC 120, HL). See also *Re Robson*, *Howden v Robson* [1899] WN 260; *Re James's Will Trusts*, *Peard v James* [1962] Ch 226, [1960] 3 All ER 744.

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608. Stirpital survivorship.

If all the shares in the devised property are settled and there is a general clause of accruer on the death of each life tenant without children to the survivors of the life tenants, all the accrued shares being settled in the same way as the original shares, and, if these dispositions are followed by a gift over in the event of all dying without issue¹, this may show an intention not to use 'survivors' in its proper sense, but to use it in the sense of those who survive either in person or figuratively in issue². In general, however, 'survivor' is taken in its natural sense³, and the mere fact that a fund is initially given in shares which are settled on stirpital trusts and that, on failure of the trusts in favour of one stirps, the share of that stirps is directed to accrue to the shares of the survivors of the original life tenants to be held on the trusts of their original shares, is an insufficient ground for holding that the testator intended 'survive' or 'survivors' to bear a secondary meaning⁴.

Similarly, a gift over to the 'others'⁵, or to those 'remaining'⁶, of a number of persons after a gift to each or one of them is not read as meaning 'survivors' unless in the context this is necessary⁷.

1 The absence of a gift over is not conclusive to show that 'survivor' is to be taken in the literal sense: *Powell v Hellicar* [1919] 1 Ch 138.

2 *Re Benn, Benn v Benn* (1885) 29 ChD 839 at 844-845, CA, per Cotton LJ, explaining *Waite v Littlewood* (1872) 8 Ch App 70; *Wake v Varah* (1876) 2 ChD 348 at 358, CA; *Re Bilham, Buchanan v Hill* [1901] 2 Ch 169; *Lamont (or Chearnley) v Millar* [1921] WN 334, sub nom *Curle's Trustees v Millar* 1922 SC (HL) 15. The fact that some only of the shares are settled (*Lucena v Lucena* (1877) 7 ChD 255, CA), or that there is an ultimate gift over on the death without issue of some only of the first takers (*Re Hobson, Barwick v Holt* [1912] 1 Ch 626 at 633), is not sufficient to give 'survivors' the meaning of surviving in person or in issue. In older cases 'survivors' was said to be construed as 'others' (*Holland v Allsop* (1861) 29 Beav 498; *Re Keep's Will* (1863) 32 Beav 122; *Hurry v Morgan* (1866) LR 3 Eq 152; *Badger v Gregory* (1869) LR 8 Eq 78; *Re Row's Estate* (1874) 43 LJ Ch 347; *Askew v Askew* (1888) 57 LJ Ch 629), but in many of these cases all the other stirpes were in fact surviving (*Re Bilham, Buchanan v Hill* supra at 175 per Joyce J), and, as pointed out in *Waite v Littlewood* (1872) 8 Ch App 70 at 73-74 per Lord Selborne LC, it is not necessary to adopt the meaning 'others' in such cases; it is sufficient to read 'survivors' as meaning 'surviving in person or in stirps'. See also *Wake v Varah* (1876) 2 ChD 348 at 358, CA, per James LJ. This construction has, however, been dissented from in Ireland (*O'Brien v O'Brien* [1896] 2 IR 459, Ir CA), and has been described as 'forced and fanciful' (*King v Frost, Underwood v Frost, Price v Frost, Plomley v Frost* (1890) 15 App Cas 548 at 553, PC); and it is not clear that 'survivor' can properly be so construed unless the limitations are expressly framed so as to produce that result (*Re Hobson, Barwick v Holt* supra at 632-633 per Parker J). For a case where, in the context of the will, the ordinary meaning of the word was adhered to see *Browne v Rainsford* (1867) IR 1 Eq 384.

3 *Auger v Beaudry* [1920] AC 1010, PC; *Gilmour v MacPhillamy* [1930] AC 712, PC. As to the expression 'benefit of survivorship in the same family' see *Re Sadler, Furniss v Cooper* (1915) 60 Sol Jo 89.

4 *Re James's Will Trusts, Peard v James* [1962] Ch 226 at 245, [1960] 3 All ER 744 at 754. As to distribution per stirpes generally see PARAS 680-681 post.

5 *Re Chaston, Chaston v Seago* (1881) 18 ChD 218 at 223 (where 'the others and other of my said children' was held to mean 'children other than children who die or have died without leaving lawful issue'); followed in *Re Crosse, Crosse v Crosse* [1933] WN 36. See also *Slade v Parr* (1842) 7 Jur 102 (where the context contained the word 'survivors'). The 'others surviving' of a number of persons may according to the context mean 'then surviving' (*Beckwith v Beckwith* (1876) 36 LT 128, CA), or 'others' (*Re Arnold's Trusts* (1870) LR 10 Eq 252; but as to this case see the cases cited in PARA 607 note 9 ante).

6 *Re Speak, Speak v Speak* (1912) 56 Sol Jo 273 (not following *Sheridan v O'Reilly* [1900] 1 IR 386).

7 *Re Hagen's Trusts* (1877) 46 LJ Ch 665; *Stanley v Bond* [1913] 1 IR 170.

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609. Ascertainment of survivors at date of distribution.

Where there is a gift to a number of persons and the survivors¹ and survivor of them, or with benefit of survivorship, or in like words², or where there is a postponed gift to persons 'surviving', then, in default of any expressed intention of the testator³, the survivorship is prima facie referred to the period of distribution⁴. Thus the time in question, where the gift is immediate, is the testator's death⁵, and, where the gift is postponed to a life estate, is the death of the life tenant⁶ or the death of the testator, whichever last happens⁷; and this applies whether the gift is of real or of personal estate⁸.

1 A gift to 'survivors' may vest in a sole survivor: *Hearn v Baker* (1856) 2 K & J 383.

2 *Wiley v Chantepedrix* [1894] 1 IR 209 at 215. It is assumed that the words are words of gift by way of purchase, and not merely words of limitation. As to the use of such words as words of limitation see PARA 679 post.

3 *Blackmore v Snee* (1857) 1 De G & J 455 at 460. For examples of a context clearly showing such an intention see *Wordsworth v Wood* (1847) 1 HL Cas 129 at 156; *White v Baker* (1860) 2 De GF & J 55. For an example of a context excluding the rule in the text see *Rogers v Towsey* (1845) 9 Jur 575.

4 *Cripps v Wolcott* (1819) 4 Madd 11 at 15; *Vorley v Richardson* (1856) 8 De GM & G 126 at 129 (when youngest child attained 21); *Wiley v Chanteperdrix* [1894] 1 IR 209 at 215. In certain early cases survivorship was held, even in a postponed gift, to refer to the testator's death (see *Rose d Vere v Hill* (1766) 3 Burr 1881; *Wilson v Bayly* (1760) 3 Bro Parl Cas 195, HL; *Doe d Long v Prigg* (1828) 8 B & C 231), but the rule in *Cripps v Wolcott* supra has been constantly followed in England, and in Scottish cases has been approved by the House of Lords (*Young v Robertson* (1862) 4 Macq 314 at 319, HL (where Lord Westbury LC stated that the rule of construction is the same in the jurisprudence of both England and Scotland); *Bowman v Bowman* [1899] AC 518 at 525-526, HL). See also *Outerbridge v Hollis* [1951] WN 318, PC. For the meaning of 'period of distribution' see PARA 597 note 1 ante.

5 *Stringer v Phillips* (1730) 1 Eq Cas Abr 292; *Bass v Russell* (1829) Taml 18; *Ashford v Haines* (1851) 21 LJ Ch 496; *Neathway v Reed* (1853) 3 De GM & G 18; *Howard v Howard* (1856) 21 Beav 550; *Re Phillips* (1921) 151 LT Jo 162. The will may show that 'survivor' means survivor inter se, so that if of two persons both die in the lifetime of the life tenant, the executors of the survivor will take: *Re Wood, Hardy v Hull* (1923) 130 LT 408. See also *Young's Trustees v Young* 1927 SC (HL) 6.

6 *Cripps v Wolcott* (1819) 4 Madd 11; *Re Benn, Benn v Benn* (1885) 29 ChD 839 at 844, CA, per Cotton LJ; *Re Poultney, Poultney v Poultney* [1912] 2 Ch 541 at 543, CA, per Cozens-Hardy MR (stating the rule in *Cripps v Wolcott* supra as 'where there is a gift to A for life, with remainder to A, B and C and to the survivors or survivor, the survivorship is ascertained at the death of the tenant for life'); *Re Douglas's Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 3 All ER 785, [1959] 1 WLR 1212, CA. See also *Jenour v Jenour* (1805) 10 Ves 562; *Blewitt v Roberts* (1841) Cr & Ph 274 at 283; *Taylor v Beverley* (1844) 1 Coll 108; *Whitton v Field* (1846) 9 Beav 368; *Davies v Thorns* (1849) 3 De G & Sm 347; *M'Donald v Bryce* (1853) 16 Beav 581; *Neathway v Reed* (1853) 3 De GM & G 18; *Re Pritchard's Trusts* (1855) 3 Drew 163; *Hearn v Baker* (1856) 2 K & J 383; *Re Crawhall's Trust* (1856) 8 De GM & G 480; *Hesketh v Magennis* (1859) 27 Beav 395; *Young v Davies* (1863) 2 Drew & Sm 167 at 170; *Naylor v Robson* (1865) 34 Beav 571; *Re Belfast Town Council, ex p Sayers* (1884) 13 LR Ir 169 at 172.

7 *Spurrell v Spurrell* (1853) 11 Hare 54.

8 *Re Gregson's Trust Estate* (1864) 2 De GJ & Sm 428; *Buckle v Fawcett* (1845) 4 Hare 536 at 542 (mixed fund). See also *Howard v Collins* (1868) LR 5 Eq 349. For doubts as to the application of the rule to real estate see *Taafe v Conmee* (1862) 10 HL Cas 64 at 77.

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610. Survivorship on contingent event.

Where there is a gift to several persons, followed by an express contingent gift over on any event to the survivors or survivor, the survivorship may be independent of both the contingent event and the period of distribution¹, or alternatively may refer either to the period of distribution² or to the contingent event³, according to the context in the particular case.

¹ I.e. it may refer only to survivorship between the named persons: *White v Baker* (1860) 2 De GF & J 55; *Re Wood, Hardy v Hull* (1923) 130 LT 408. The court leans against a construction involving a gift of the whole to the last survivor, particularly where there are words indicating a tenancy in common, and it attempts to discover a time to which the survivorship is to be referred: *Cambridge v Rous* (1858) 25 Beav 409 at 415. For the meaning of 'period of distribution' see PARA 597 note 1 ante.

² *Cambridge v Rous* (1858) 25 Beav 409; *Re Pickworth, Snaith v Parkinson* [1899] 1 Ch 642, CA.

³ *Crowder v Stone* (1829) 3 Russ 217.

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D. ALTERNATIVE GIFTS

611. Gifts expressed in the alternative.

Two or more gifts may be made to take effect alternatively, for example in certain mutually exclusive events¹; thus a gift to A or B, where A and B are donees described or named and mutually exclusive², is an alternative gift. In such a gift there is generally a contingency implied, even if not expressed, on the happening of which the gift is to take effect in favour of the second-named donee, and the circumstances of the gift must be ascertained before the contingency can be determined³. Usually it refers to the death of the first-named donee before a particular event, for example the testator's death or some other date of distribution, and it is inferred that the testator's intention is that the first donee is to take if then alive, but that the second donee is to take if the first does not survive the particular event⁴.

If such a contingency is not expressed or implied, then, if A and B are mutually exclusive, the gift⁵ is void for uncertainty⁶ unless either there is a general charitable intent, in which case the court is able to determine the mode in which the gift is to take effect⁷, or where there is direct evidence of his intention⁸, or the gift is made by way of a power of appointment which is in the nature of a trust⁹.

1 It has first to be determined in all cases whether the second gift (eg where it is to take effect on the death of the first donee without issue, or leaving issue) takes effect by way of succession to the first gift, or is an alternative to the first gift: *Ware v Watson* (1855) 7 De GM & G 248 at 258. See also *Hatch v Hatch* (1855) 20 Beav 105; *Parsons v Coke* (1858) 4 Drew 296. An executory limitation to take effect on the donee dying under certain circumstances (eg leaving no issue) may take effect on the death of the donee under these circumstances during the life of the testator, and, therefore, as a substitutional gift: see PARA 612 post. As to alternative limitations one of which is void under the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1082. A gift 'to A and/or B' constitutes a joint tenancy: *Re Lewis, Goronway v Richards* [1942] Ch 424, [1942] 2 All ER 364.

2 There may be cases, such as gifts to 'heirs or next of kin', where the terms are used as applying to one class and not as alternative: *Lowndes v Stone* (1799) 4 Ves 649; *Re Thompson's Trusts* (1878) 9 ChD 607. If B is the general term for a large class (namely 'descendants') of which A is an enumeration of members, or a sub-class (namely 'children'), and the gift is to 'each of A or B', the gift is not void but includes all B, and 'or' need not be altered: see *Clay v Pennington* (1835) 7 Sim 370; *Solly v Solly* (1858) 5 Jur NS 36.

3 See PARA 482 note 1 ante.

4 *Re Sibley's Trusts* (1877) 5 ChD 494 at 499. See also *Turner v Moor* (1801) 6 Ves 557 at 559; *Salisbury v Petty* (1843) 3 Hare 86 at 93; *Carey v Carey* (1857) 6 I Ch R 255; *Walmsley v Foxhall* (1863) 1 De GJ & Sm 605; *Re Pearce, Eastwood v Pearce* (1912) 56 Sol Jo 686, CA. Cf *Bowman v Bowman* [1899] AC 518 at 523, HL (where 'or' was held to mean 'whom failing', and Lord Watson said that the point to be determined was at what period of time the testator must be held to have intended that the right of the donee should come to an end if he was not then alive, and that the right of the conditional donee should arise). Thus a gift to A, with a substitutional gift to his children or to his issue, takes effect in favour of A if he is living at the period of distribution (*Montagu v Nucella* (1826) 1 Russ 165; *Jones v Torin* (1833) 6 Sim 255; *Whitcher v Penley* (1846) 9 Beav 477; *Chipchase v Simpson* (1849) 16 Sim 485; *Penley v Penley* (1850) 12 Beav 547; *Sparks v Restal* (1857) 24 Beav 218; *Margitson v Hall* (1864) 10 Jur NS 89; *Holland v Wood* (1870) LR 11 Eq 91), and in favour of his children or issue if he is not then living (*Davenport v Hanbury* (1796) 3 Ves 257; *Girdlestone v Doe* (1828) 2 Sim 225 (A or his heirs); *Salisbury v Petty* (1843) 3 Hare 86; *Re Porter's Trust* (1857) 4 K & J 188). The contingency of the death of one of the alternate donees in the lifetime of the life tenant may sometimes be implied: see *Re Fisher, Robinson v Eardley* [1915] 1 Ch 302. A gift may be given for alternative purposes and be capable of taking effect for the second purpose without the first being carried out: *Re Sahal's Will Trusts, Alliance Assurance Co Ltd v A-G* [1958] 3 All ER 428, [1958] 1 WLR 1243.

5 If read without alteration, but sometimes words are capable of alteration. Thus 'or' may be changed to 'and' if necessary, and in accordance with the whole will (*Richardson v Spragg* (1718) 1 P Wms 434; *Eccard v*

Brooke (1790) 2 Cox Eq Cas 213; *Horridge v Ferguson* (1822) Jac 583; *Parkin v Knight* (1846) 15 Sim 83; *Re Turney*, *Turney v Turney* [1899] 2 Ch 739 at 745, CA; *Re Hayden, Pask v Perry* [1931] 2 Ch 333; and see generally para 545 ante), but this is not done if the gift can be read as a substitutional gift on some contingency (*Speakman v Speakman* (1850) 8 Hare 180). See also note 4 supra.

6 *Richardson v Spraag* (1718) 1 P Wms 434 per Jekyll MR; *Longmore v Broom* (1802) 7 Ves 124 at 128 per Grant MR; *Flint v Warren* (1847) 15 Sim 626 at 629. As to uncertainty generally see PARAS 554-558 ante.

7 See CHARITIES vol 8 (2010) PARA 104 et seq.

8 As to the circumstances in which direct evidence of intention may be admitted to assist in interpretation see PARAS 473, 483, 506-507 ante.

9 *Longmore v Broom* (1802) 7 Ves 124. In such a case, where there is no appointment and no gift over in default of appointment, the gift goes to the donees A and B equally: *Penny v Turner* (1848) 2 Ph 493; *Re White's Trusts* (1860) John 656. See generally POWERS vol 36(2) (Reissue) PARA 208.

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612. Original and substitutional gifts.

An alternative gift is either original or substitutional¹. The gift is original where there is a direct gift to the second donee, even though it is only to take effect if the contingency happens²; it is substitutional where the second donee takes no direct gift but merely, on the happening of the contingency, the benefit which has been already given to the first donee. Thus the gift is substitutional where the interest which the alternative donee is to take is by a prior clause in the will given to the first donee, so that the second donee merely stands in the place of the first if the first donee is not capable of taking on the particular contingency in contemplation. A gift is original where the interest which the second donee is to take is not by a prior clause given to the first donee³. Thus if the gift is to a person for life and after his death to the testator's nephews and nieces then living and the issue of such of them as may be then dead, such issue to take their parent's share only, there is no gift to a nephew who predeceases the life tenant leaving issue, and his issue are the objects of an original gift. Where, however, the gift after the death of the life tenant is to all the testator's nephews and nieces but, if any die before the life tenant leaving issue, then to the issue of that one, the issue taking the parent's share, a nephew who predeceases the life tenant is at first included in the class, and, on his falling out of it, his issue are substituted for him; that is, the gift to the issue is substitutional⁴.

1 Whether the gift is original or substitutional is a matter of construction. Thus a gift preceded by 'and' is not necessarily original: *Hurry v Hurry* (1870) LR 10 Eq 346 at 348 per James V-C (commenting on *Re Merricks' Trusts* (1866) LR 1 Eq 551 at 558). See also *Maynard v Wright* (1858) 26 Beav 285. In *Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 325, there was a direction to sell the real and personal estate on the death of either of two sons who were appointed executors, and to divide the proceeds equally 'amongst my then surviving children and their respective issue'. It was held that 'their issue' were not words of limitation, and that the issue of the surviving children could not compete with their parents and took nothing, while 'issue' was extended to children of deceased children, who took the share which their deceased parent would have taken. Ordinarily, however, in a gift to a person and his issue, the issue take in competition with the named donee: *Re Hammond, Parry v Hammond* [1924] 2 Ch 276.

2 Eg as in *Surridge v Clarkson* (1866) 14 WR 979.

3 *Lanphier v Buck* (1865) 2 Drew & Sm 484 at 494.

4 *Lanphier v Buck* (1865) 2 Drew & Sm 484; *Martin v Holgate* (1866) LR 1 HL 175; *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206 at 209. See also *Attwood v Alford* (1866) LR 2 Eq 479; *Burt v Hellyar* (1872) LR 14 Eq 160; *Re Earle's Settlement Trusts, Reiss v Norrie* [1971] 2 All ER 1188, [1971] 1 WLR 1118 (where a gift over in

a marriage settlement to the issue of uncles and aunts who might predecease the husband was substitutional, as the original gift to the uncles and aunts was immediately vested liable to be divested). In the case of a devise to a person and his heirs (*Brett v Rigden* (1568) 1 Plowd 340; *Warner v White* (1782) 3 Bro Parl Cas 435, HL (overruling a dictum of Popham J in *Fuller v Fuller* (1595) Cro Eliz 422)), or to a person and the heirs of his body (*Hartopp's Case* (1591) Cro Eliz 243; *Hutton v Simpson* (1716) 2 Vern 722; *Denn d Radclyffe v Bagshaw* (1796) 6 Term Rep 512; *Doe d Turner v Kett* (1792) 4 Term Rep 601), or of a bequest to a person, his executors or administrators (*Elliott v Davenport* (1705) 1 P Wms 83), the additional words are words of limitation. The gifts are not substitutional, and the death of the named person in the life of the testator does not enable the heirs or the executors or administrators to take as purchasers under the will. As to 'heirs' as a word of limitation in wills see PARA 668 et seq post. As to lapse generally see PARA 450 et seq ante. In an immediate gift to a person or his personal representatives, the personal representatives take by substitution if the legatee dies in the lifetime of the testator (*Gittings v M'Dermott* (1834) 2 My & K 69), but, where the gift is postponed, expressions such as 'personal representatives' are treated as simply another way of giving the legatee a vested interest on the testator's death, and there is no substitutional gift; and, if the legatee dies in the lifetime of the testator, the personal representatives do not take (*Re Porter's Trust* (1857) 4 K & J 188 at 193, 198 per Wood V-C (explaining *Corbyn v French* (1799) 4 Ves 418); *Thompson v Whitelock* (1859) 4 De G & J 490; *Re Turner* (1865) 2 Drew & Sm 501). The position is similar in a postponed gift to 'A or his heirs', where 'heirs' is used in the sense of 'representatives' (*Tidwell v Ariel* (1818) 3 Madd 403), but not where the word is used in the sense of persons entitled as on intestacy; in such a case the heirs take as named individuals (*Re Porter's Trust* supra). Where persons referred to as 'personal representatives' are intended to take beneficially, they take by substitution: *Wingfield v Wingfield* (1878) 9 ChD 658.

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613. Effect of time of death of prior donee.

The effect of the time of death of the prior donee in ascertaining the rights of the donees under a substitutional gift varies according as the primary gift is to a named person or group of named persons¹, or to a class, and, if it is to a class, then according as the gift takes effect immediately on the testator's death or is postponed to a subsequent date².

If the primary gift is to a named person or group of named persons, the substitutional gift takes effect on the death of the primary donee, whether:

- 62 (1) before the date of the will;
- 63 (2) after the date of the will and before the testator's death³; or
- 64 (3) after the testator's death and before the date of distribution⁴.

If the substitutional gift is to a class, the class consists in the case of heads (1) and (2) above of those who are living at the testator's death and in the case of head (3) above of those who are living at the death of the primary donee⁵.

If the original gift is to a class, a person who was dead at the date of the will is not included in it⁶, and consequently no one can take in his place by way of substitution⁷. Thus if the original donees are a class of parents, and there is a substitutional gift of each parent's share to his children, the children of a parent dead at the date of the will cannot take⁸.

A substitutional gift to issue through all degrees is per se contingent. It is a question of construction when the substitution is to take place, but the substituted issue must survive their parents and also the date of substitution (if this is different)⁹.

Where the primary gift to a class is immediate, that is, not preceded by any life or other limited interest, a substitutional gift on the death of a member of the class takes effect on the death in the lifetime of the testator of any persons who were living at the date of the will and who, if they had survived, would have taken as members of the class¹⁰.

Where the gift is postponed, the testator is considered to be providing for the death of members of the class between his own death, or the time of ascertainment of the class, and the period of distribution, or the time when the gift is to come into possession¹¹. Accordingly, it is prima facie only in respect of persons who are ascertained as members of the class, and capable of taking under the gift, that substitution is effected¹², and the substitutional gift fails as to those who die before the testator or before the time when the class is to be ascertained¹³. If, however, there is no gap between the time of ascertainment of the class and the time of distribution, persons substituted for donees dying in the testator's lifetime, even before the date of the will, may be let in¹⁴.

1 le a number of persons taking not as a class, but as individuals: see PARA 592 ante. Cf *Aitken's Trustees v Aitken* 1970 SC 28, HL.

2 See *Ive v King* (1852) 16 Beav 46 at 53-54.

3 Even where the death of the legatee occurs before that of the testator, the gift over takes effect on the presumption that the ulterior legatee was substituted in order to prevent a lapse of the legacy: *Ive v King* (1852) 16 Beav 46 at 54. There is no distinction between a gift to a person known to be alive, and in the event of his death to his children, and a gift to a person who the testator may suppose or believe to be living, but who is in fact dead, with a gift over to his children in case of his death: *Ive v King* supra at 55-56. As to death of the primary legatee before the date of the will see *Hannam v Sims* (1858) 2 De G & J 151; *Re Booth's Will Trusts*, *Robbins v King* (1940) 163 LT 77. As to death between the date of the will and the death of the testator see *Le Jeune v Le Jeune* (1837) 2 Keen 701; *Ive v King* supra at 54; *Ashling v Knowles* (1856) 3 Drew 593; *Hodgson v Smithson* (1856) 8 De GM & G 604; *Re Faulding's Trust* (1858) 26 Beav 263; *Jones v Frewin* (1864) 3 New Rep 415.

4 *Ive v King* (1852) 16 Beav 46. It makes no difference whether the primary legatee dies before or after the testator, so long as he dies before the death of the life tenant or other date of distribution: *Ashling v Knowles* (1856) 3 Drew 593.

5 *Ive v King* (1852) 16 Beav 46 at 57.

6 The testator is not in this case referring to specific individuals who he believes to be alive (see note 3 supra), and, in referring to a class, he is understood to refer to living persons: *Re Hotchkiss' Trusts* (1869) LR 8 Eq 643 at 649; *Re Musther, Groves v Musther* (1890) 43 ChD 569 at 572, CA; *Re Brown, Leeds v Spencer* [1917] 2 Ch 232.

7 In order to claim under the will, the substituted legatees must point out the original legatees in whose place they demand to stand (*Christopherson v Naylor* (1816) 1 Mer 320 at 326); and the substitutional gift fails where the corresponding member of the primary class was dead at the date of the will, and, therefore, could not have taken as a member of the class under the will (*Coulthurst v Carter* (1852) 15 Beav 421 at 427; *Ive v King* (1852) 16 Beav 46 at 53; *Congreve v Palmer* (1853) 16 Beav 435; *Re Wood's Will* (1862) 31 Beav 323).

8 *Christopherson v Naylor* (1816) 1 Mer 320; *Gray v Garman* (1843) 2 Hare 268; *Re Hotchkiss' Trusts* (1869) LR 8 Eq 643; *Atkinson v Atkinson* (1872) IR 6 Eq 184 at 189; *Kelsey v Ellis* (1878) 38 LT 471; *Re Barker, Asquith v Saville* (1882) 47 LT 38; *Re Webster's Estate, Widgen v Mello* (1883) 23 ChD 737; *Re Chinery, Chinery v Hill* (1888) 39 ChD 614; *Re Musther, Groves v Musther* (1890) 43 ChD 569; *Re Wood, Tullett v Colville* [1894] 3 Ch 381, CA; *Re Offiler, Offiler v Offiler* (1901) 83 LT 758; *Gorringe v Mahlstedt* [1907] AC 225, HL; *Re Cope, Cross v Cross* [1908] 2 Ch 1, CA; *Mackintosh (or Miller) v Gerrard* [1947] AC 461, HL; *Re Brooke's Will Trusts, Jubber v Brooke* [1953] 1 All ER 668, [1953] 1 WLR 439. In *Butter v Ommoney* (1827) 4 Russ 70, children of members of the class who had died in the testator's lifetime were excluded from the substitutional gift. As to certain decisions which were founded on the view that *Christopherson v Naylor* supra should not be followed see *Re Hotchkiss' Trusts* supra.

9 *Re Earle's Settlement Trusts, Reiss v Norrie* [1971] 2 All ER 1188, [1971] 1 WLR 1118.

10 *Re Hayward, Creery v Lingwood* (1882) 19 ChD 470. As to the members of the substituted class see PARA 596 et seq ante.

11 *Re Gilbert, Daniel v Matthews* (1886) 54 LT 752.

12 See *Re Porter's Trust* (1857) 4 K & J 188 at 191-192 per Wood V-C (citing *Ive v King* (1852) 16 Beav 46). The substitutional gift took effect in *Hilton v Hilton* (1866) 15 WR 193.

13 *Thornhill v Thornhill* (1819) 4 Madd 377; *Neilson v Monro* (1879) 27 WR 936; *Re Hannam, Haddelsey v Hannam* [1897] 2 Ch 39; *Re Ibbetson, Ibbetson v Ibbetson* (1903) 88 LT 461 (to the child or children of J and H 'or their heirs'). See also *Ive v King* (1852) 16 Beav 46 (where the rule is stated but the authorities cited refer to another point); *Ashling v Knowles* (1856) 3 Drew 593 at 595. Cf *Smith v Farr* (1839) 3 Y & C Ex 328.

14 *King v Cleaveland* (1858) 26 Beav 26 (affd (1859) 4 De G & J 477) (to persons 'then living' or their representatives); *Re Philps' Will* (1868) LR 7 Eq 151 (to persons 'then living' or their heirs).

UPDATE

613 Effect of time of death of prior donee

NOTE 6--See, however, *Thomas v Kent* [2006] EWCA Civ 1485, [2007] WTLR 178 (testator knew his brothers had died when he made his will, therefore substitution gift to his 'brothers and sisters' included those siblings who had died before the will was made).

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614. Gifts to children.

The exclusion of children from taking under a gift defined by reference to the parent's share is avoided where the gift can be construed as original and not substitutional. Thus the gift to the children may not be alternative to a gift actually made to the parent; it may be a gift of a share computed on the hypothesis that there had been a gift to the parent. This is an original gift to the children, and does not fail because the parent could not have taken¹.

Further, even where the children are expressed to take only their parent's share, according to the construction of the whole will the class of children may be ascertained, not by reference to those parents only who could take under the original gift to parents, but by reference to all the parents, whether eventually capable of taking or not; this, again, is an original gift to the children².

1 *Loring v Thomas* (1861) 1 Drew & Sm 497; *Re Chapman's Will* (1863) 32 Beav 382; *Re Woolrich, Harris v Harris* (1879) 11 ChD 663; *Re Chinery, Chinery v Hill* (1888) 39 ChD 614 at 618 per Chitty J; *Re Parsons, Blaber v Parsons* (1894) 8 R 430 at 434; *Re Lambert, Corns v Harrison* [1908] 2 Ch 117; *Re Metcalfe, Metcalfe v Earle* [1909] 1 Ch 424; *Re Stokes, Barlow v Bullock* (1907) 52 Sol Jo 11; *Re Taylor, Taylor v White* (1911) 56 Sol Jo 175; *Re Williams, Metcalf v Williams* [1914] 1 Ch 219 (affd [1914] 2 Ch 61, CA); *Re Kirk, Wetthey v Kirk* (1915) 85 LJ Ch 182; *Re Hickey, Beddoes v Hodgson* [1917] 1 Ch 601 (legacy to the descendants of A or their descendants 'living at my death'; words held to govern whole gift). *Loring v Thomas* supra is not affected by *Gorringe v Mahlstedt* [1907] AC 225, and is recognised as an authority in *Barraclough v Cooper* [1908] 2 Ch 121n at 125n. See also *Re Lambert, Corns v Harrison* supra at 121 per Eve J.

2 *Jarvis v Pond* (1839) 9 Sim 549 (alternative gift to the children of 'any' sons and daughters 'to have their father's or mother's part'; children of son and daughter dead at date of will entitled to share, even though 'some violence' was done in assigning a share to the parents); *Loring v Thomas* (1861) 1 Drew & Sm 497 ('any' of parents); *Re Sibley's Trusts* (1877) 5 ChD 494 at 501 (where it was said that 'all and every' the parents must mean 'more than two'). In *Re Metcalfe, Metcalfe v Earle* [1909] 1 Ch 424 at 426, Joyce J suggested a distinction between a gift to children and a gift to a class of another description (such as nephews and nieces) where the testator might not have means of knowing the state of the family. As to a postponed alternative gift see *Smith v Smith* (1837) 8 Sim 353; *Habergham v Ridehalgh* (1870) LR 9 Eq 395 (where the gifts were original, being framed on the hypothesis that the person for whom the donees were alternative were ascertained members of the class of first donees, and accordingly it was held that these alternative donees might take in such a case, although the members of the class of first donees predeceased the testator). In *Collins v Johnson* (1835) 8 Sim

356n, the gift was by reference to a prior gift to individuals: see *Re Hannam, Haddelsey v Hannam* [1897] 2 Ch 39 at 45 per North J.

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615. Composite class of parents and issue.

Where a gift is framed as a gift to a composite class formed of a class of parents living at a certain period and a class of children of parents then dead, there is prima facie an independent and original gift to that class of children¹, and children of parents who were dead before the date of the will may take², as well as children of parents who died after that date but before the testator.

1 See *Re Lord's Settlement, Martins Bank Ltd v Lord* [1947] 2 All ER 685 (settlement); *Re Hooper's Settlement Trusts, Bosman v Hooper* [1948] Ch 586, [1948] 2 All ER 261 (settlement). For cases of contrary intention see *Waugh v Waugh* (1833) 2 My & K 41 (where a direction as to the children's share confined the class of children); *Re Thompson's Trusts, ex p Tunstall* (1854) 5 De GM & G 280.

2 *Tytherleigh v Harbin* (1835) 6 Sim 329; *Giles v Giles* (1837) 8 Sim 360; *Rust v Baker* (1837) 8 Sim 443; *Bebb v Beckwith* (1839) 2 Beav 308; *Gaskell v Holmes* (1844) 3 Hare 438; *Coulthurst v Carter* (1852) 15 Beav 421; *Etches v Etches* (1856) 3 Drew 441 at 447 (not followed in *Re Earle's Settlement Trusts, Reiss v Norrie* [1971] 2 All ER 1188, [1971] 1 WLR 1118 (where a gift over in a marriage settlement to the uncles and aunts who might predecease the husband was substitutional as the original gift was vested liable to be divested)); *Re Jordan's Trusts* (1863) 2 New Rep 57; *Heasman v Pearse* (1871) 7 Ch App 275; *Re Morrison* [1913] VLR 348. In *Re Faulding's Trusts* (1858) 26 Beav 263, the parent died in the lifetime of the testatrix, but it does not appear whether he died before or after the date of her will.

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616. Conditions attaching to alternative gift.

Conditions attaching to a gift do not prima facie attach to a gift alternative to it, whether original or substitutional¹, although in the case of substitutional gifts it may much more easily be inferred that they attach than in the case of alternative original gifts². Thus unless the testator so provides, it is not in general necessary that an alternative donee should survive the date of distribution in order to take, whether the gift is original³ or substitutional⁴; nor, in an alternative and original gift, is it in general necessary, unless the testator so provides, that the alternative donee should survive the person for whom he is alternative⁵. In a substitutional gift it is, however, in general necessary that the substituted donee should survive the person for whom he is substituted⁶.

1 *Martin v Holgate* (1866) LR 1 HL 175. See also *Lyon v Coward* (1846) 15 Sim 287; *Smith v Palmer* (1848) 7 Hare 225; *Barker v Barker* (1852) 5 De G & Sm 753; *Re Bennett's Trust* (1857) 3 K & J 280 at 285; *Re Wildman's Trusts* (1860) 1 John & H 299; *Re Pell's Trust* (1861) 3 De GF & J 291; *Lanphier v Buck* (1865) 2 Drew & Sm 484 at 496. For cases where the contingency of the first gift applied to the alternative gift see *Bennett v Merriman* (1843) 6 Beav 360; *Macgregor v Macgregor* (1845) 2 Coll 192; *Re Kirkman's Trust* (1859) 3 De G & J 558. In so far as these latter cases do not depend on the particular contexts of the wills there in question, they are disapproved in *Martin v Holgate* supra.

2 *Martin v Holgate* (1866) LR 1 HL 175 at 187 per Lord Chelmsford.

3 *Thompson v Clive* (1857) 23 Beav 282; *Martin v Holgate* (1866) LR 1 HL 175; *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206; *Campbell's Trustee v Dick* 1915 SC 100. See also PARAS 611 note 4, 612 text and note 4 ante.

4 *Masters v Scales* (1850) 13 Beav 60; *Re Battersby's Trusts* [1896] 1 IR 600; *Re Bradbury, Wing v Bradbury* (1904) 73 LJ Ch 591, CA; *Re Langlands, Langlands v Langlands* (1917) 87 LJ Ch 1. Cf *Todd's Trustees v Todd's Executrix* 1922 SC 1 (substitutional gift, and, therefore, no right vested in the children of H, a son, who predeceased the life renter). The doubt expressed on this point in *Crause v Cooper* (1859) 1 John & H 207 at 213 per Wood V-C was recognised by him as unfounded in *Re Merricks' Trusts* (1886) LR 1 Eq 551 at 558. For a case of a context to the contrary see *Re Kirkman's Trust* (1859) 3 De G & J 558.

5 *Lyon v Coward* (1846) 15 Sim 287; *Lanphier v Buck* (1865) 2 Drew & Sm 484 at 498; *Heasman v Pearse* (1871) 7 Ch App 275; *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206. Cf *Re Jordan's Trusts* (1863) 2 New Rep 57. For a case of a contrary intention shown by the will see *Barker v Barker* (1852) 5 De G & Sm 753.

6 *Thompson v Clive* (1857) 23 Beav 282; *Crause v Cooper* (1859) 1 John & H 207; *Lanphier v Buck* (1865) 2 Drew & Sm 484; *Re Turner* (1865) 2 Drew & Sm 501; *Re Merricks' Trusts* (1866) LR 1 Eq 551 at 560 (explained in *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206 at 209); *Re Manly's Will Trusts, Burton v Williams* [1969] 3 All ER 1011 at 1024, [1969] 1 WLR 1818 at 1831.

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617. Ascertainment of class.

Subject to the principle that conditions attaching to a gift do not normally attach to a substituted gift¹, the class of substituted donees is ascertained according to the usual rules². Whether the members of classes taking under original and substituted gifts may take concurrently depends on the correspondence between the members of those classes respectively. A gift to a class of parents or their children, or parents or their issue, is construed as substituting for each parent his own children or issue, wherever the context allows that construction³. Thus when there are words denoting an intention to divide the property into shares for the purpose of substitution⁴, the parents surviving the period of distribution⁵ and the children or issue of parents dying before that period⁶ then take concurrently. Otherwise, where the original and substitutional gifts are both to classes and there is nothing indicative of a substitution for a member of the original class of a corresponding member of the substituted class⁷, the gifts are mutually exclusive, and, if any member of the original class survives the period of distribution, no member of the substituted class can take⁸.

In the absence of a contrary intention being shown⁹, the substituted donees as between themselves are joint tenants¹⁰, even where the original donees are tenants in common and, therefore, as between original donees and substituted donees taking with them, there is a tenancy in common.

1 As to this principle see PARAS 615-616 ante.

2 As to these rules see PARA 593 et seq ante. Thus the class is ascertained at the testator's death (*Ive v King* (1852) 16 Beav 46 (children); *Re Philips' Will* (1868) LR 7 Eq 151 at 154 (heirs, in sense of next of kin); *Wingfield v Wingfield* (1878) 9 ChD 658 (heirs)), subject, in the case of a postponed gift, to letting in members of the class coming into existence before the date of distribution (*Re Sibley's Trusts* (1877) 5 ChD 494; *Re Jones's Estate, Hume v Lloyd* (1878) 47 LJ Ch 775 (not following *Hobgen v Neale* (1870) LR 11 Eq 48 on this point)).

3 *Re Coley, Gibson v Gibson* [1901] 1 Ch 40 at 44; *Re Alderton, Hughes v Vanderspar* [1913] WN 129.

4 *Re Gilbert, Daniel v Matthews* (1886) 54 LT 752 (where it was said that in *Re Dawes' Trusts* (1876) 4 ChD 210 the court's attention had not been drawn to the authorities); *Re Miles, Miles v Miles* (1889) 61 LT 359.

5 For the meaning of 'period of distribution' see PARA 597 note 1 ante.

6 If all of the original class survive that period, the substituted class are excluded: *Re Coley, Gibson v Gibson* [1901] 1 Ch 40 at 43.

7 Eg gifts to children 'or their heirs': *Finlason v Tatlock* (1870) LR 9 Eq 258.

8 *Re Coley, Gibson v Gibson* [1901] 1 Ch 40.

9 See *Lyon v Coward* (1846) 15 Sim 287 at 290-291; *Hodges v Grant* (1867) LR 4 Eq 140; *A-G v Fletcher* (1871) LR 13 Eq 128; *Re Horner, Eagleton v Horner* (1887) 37 ChD 695 at 711 (where there were double words of severance sufficient to apply to the substituted donees). As to distribution per capita or per stripes in such cases see PARAS 680-681 post.

10 *Davenport v Hanbury* (1796) 3 Ves 257; *Bridge v Yates* (1842) 12 Sim 645; *Salisbury v Petty* (1843) 3 Hare 86 at 93; *Re Hodgson's Trusts* (1854) 1 K & J 178; *M'Gregor v M'Gregor* (1859) 1 De GF & J 63; *Penny v Clarke* (1860) 1 De GF & J 425 at 431; *Coe v Bigg* (1863) 1 New Rep 536; *Lanphier v Buck* (1865) 2 Drew & Sm 484; *Heasman v Pearse* (1870) LR 11 Eq 522 at 535 (on appeal (1871) 7 Ch App 275 at 283); *Re Yates, Bostock v D'Eyncourt* [1891] 3 Ch 53 (disapproving *Shepherdson v Dale* (1866) 12 Jur NS 156); *Re Battersby's Trusts* [1896] 1 IR 600.

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618. Failure of alternative gift.

Where an alternative gift fails by reason of the event not having happened on which it is to take effect, the prior gift to the first donee may take effect even though he was not living at the period of distribution¹, because the alternative gift operates as a divesting gift only². However, this will not be the case if the first donee predeceases the testator so that the gift to him lapses³.

In the case of a gift to a group or class, a substitutional gift of the shares of those who die leaving issue to their issue does not affect the shares of those who die without leaving issue⁴.

1 *Gray v Garman* (1843) 2 Hare 268; *Salisbury v Petty* (1843) 3 Hare 86 at 93.

2 As to divesting generally see PARA 726 post.

3 *Hodgson v Clare* [1999] All ER (D) 359, sub nom *Re Owen, Hodgson v Clare* [2002] WTLR 619.

4 *Baldwin v Rogers* (1853) 3 De GM & G 649; *Strother v Dutton* (1857) 1 De G & J 675 at 676.

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(ii) Identification of Donees

A. IDENTIFICATION BY REFERENCE TO RELATIONSHIPS

(A) GENERAL RULE AND PARTICULAR DESCRIPTIONS

619. General rule.

Donees may be identified in a will by reference to relationship, or to the holding of an office or otherwise¹. A description by relationship *prima facie* refers only to persons related by blood², including the half-blood³, and in the exact relationship, if any, prescribed by the will⁴, for example grandchildren⁵, cousins⁶ or nephews and nieces⁷. *Prima facie* such a description does not refer to persons related by affinity and not consanguinity⁸; but, by the force of the context of the will⁹ or the circumstances of the case¹⁰, the description may be extended to include persons related only by affinity¹¹, or in the same or a different degree of distance in relationship¹². The mere fact that in a prior part of the will a person is described as a relative does not alone admit to a share in a subsequent gift to relatives of that degree either the named person¹³ or other persons of like degree with him¹⁴; but this fact is an indication in that direction¹⁵, to be taken into consideration along with the context of the whole will and the circumstances of the case admissible in evidence as to identification¹⁶.

1 As to gifts by reference to the holding of an office see PARA 652 post. A reference to a person as a legatee may refer only to an effective legatee, so that a person whose bequest fails is excluded from participating in further benefits given to 'legatees': *Re Feather*, as reported in [1945] 1 All ER 552.

2 As to the question of legitimacy see PARA 638 et seq post.

3 *Grieves v Rawley* (1852) 10 Hare 63 ('niece'); *Re Hammersley, Kitchen v Myers* (1886) 2 TLR 459; *Re Cozens, Miles v Wilson* [1903] 1 Ch 138 ('my own nephews and nieces'); *Ward v Van Der Loeff* [1924] AC 653, HL ('my brothers and sisters'; not confined to those existing at the date of the will or to those of the whole blood). Cf *Re Reed* (1888) 57 LJ Ch 790; *Re Dowson, Dowson v Beadle* [1909] WN 245 ('my own brothers and sisters'). 'Uterine brothers and sisters' means *prima facie* brothers and sisters by the same mother, but by a different father: see *Re Vincent, Public Trustee v Vincent* [1926] WN 307 (on the construction of a settlement). Where the relationship is gendered, the fact that a person has an acquired gender does not affect the disposal or devolution of property under a will made before 4 April 2005: see PARA 591 ante.

4 For the meaning of 'children' see PARA 621 post.

5 Where there are persons to satisfy the descriptions taken in their ordinary sense, and there is nothing in the will or the circumstances to give any other sense to the words, 'grandchildren' does not include great-grandchildren (*Lord Orford v Churchill* (1814) 3 Ves & B 59), but 'grandchildren of any degree' will include descendants of any degree other than children (*Re Hall, Hall v Hall* [1932] 1 Ch 262).

6 'First cousins or cousins german' was held not to include the descendants of first cousins: *Sanderson v Bayley* (1838) 4 My & Cr 56. 'First and second cousins' was held to include first cousins once and twice removed in *Re Colahan, Molloy v Hara* [1967] IR 29. Cf *Re Tully, Toolan v Costello* [1941] IR 66 (where 'all my first cousins, first cousins once removed and my second cousins' did not include second cousins once removed). 'Cousins', without further qualification, includes only first cousins: *Stoddart v Nelson, Stanger v Nelson* (1855) 6 De GM & G 68; *Stevenson v Abingdon* (1862) 10 WR 591; *Burbey v Burbey* (1862) 9 Jur NS 96; *Copland's Executors v Milne* 1908 SC 426. The dictum in *Caldecott v Harrison* (1840) 9 Sim 457 at 460, that 'cousins' includes cousins of every description, is overruled by the cases previously cited. 'Second cousins' does not normally include first cousins once removed, that is, children or grandchildren of first cousins: *Bridgnorth Corp v Collins* (1847) 15 Sim 538 at 541; *Re Parker, Bentham v Wilson* (1881) 17 ChD 262, CA (where *Mayott v Mayott* (1786) 2 Bro CC 125, *Silcox v Bell* (1823) 1 Sim & St 301 and *Charge v Goodyear* (1826) 3 Russ 140 (see note 12 *infra*) are examined). 'Half cousins' includes first cousins, first cousins once removed and second cousins: *Re Chester, Servant v Hills* [1914] 2 Ch 580.

7 As a rule, 'nephews and nieces' does not include grandchildren (*Campbell v Bouskell* (1859) 27 Beav 325; *M'Hugh v M'Hugh* [1908] 1 IR 155 (where the evidence showed that the real nephews and nieces were not the objects of bounty, and there was nothing to show who were those objects)), or great-nephews or great-nieces (*Falkner v Butler* (1765) Amb 514; *Shelley v Bryer* (1821) Jac 207; *Williamson v Moore* (1862) 8 Jur NS 875; *Re Blower's Trusts* (1871) 6 Ch App 351); and 'nieces' does not include great-nieces (*Crook v Whitley* (1857) 7 De GM & G 490). As to acquired gender see note 3 *supra*; and PARA 591 ante.

8 *Hussey v Berkeley* (1763) 2 Eden 194 at 196 (widow of a grandson, not a grandchild); *Smith v Lidiard* (1857) 3 K & J 252; *Merrill v Morton* (1881) 17 ChD 382.

9 See *Re Cozens, Miles v Wilson* [1903] 1 Ch 138; and the general rule as to construction stated in PARA 513 et seq ante.

10 See *Re Cozens, Miles v Wilson* [1903] 1 Ch 138. As to the principle of 'falsa demonstratio non nocet' see PARA 561 ante.

11 *Frogley v Phillips* (1861) 3 De GF & J 466; *Re Gue, Smith v Gue* (1892) 61 LJ Ch 510 (affd [1892] WN 132, CA) (where a nephew of the testator's wife took as a 'nephew' and the wife of that nephew took as a 'niece'); *Re Daoust* [1944] 1 All ER 443 (where 'nephews and nieces' included relations by marriage, but not those traced through two marriages, eg husbands of nieces of the testatrix's husband); *Re Davidson, National Provincial Bank Ltd v Davidson* [1949] Ch 670, [1949] 2 All ER 551 (where 'grandchildren' was held to mean grandchildren of the husband of the testatrix by a former wife); *Re Tylor, Barclays Bank Ltd v Norris* (1968) 112 Sol Jo 486 (where 'nephews and nieces' was held to include relations by marriage). In *Re Richards* (1939) 162 LT 47, 'brothers-in-law' and 'sisters-in-law' were construed in the strict sense, ie as persons traced through one marriage. Relatives by affinity are held to take rather than that the gift fail, eg where the testator has no relatives by consanguinity of the described kind, and none can come into existence to satisfy the description (*Hogg v Cook* (1863) 32 Beav 641; *Adney v Greatrex* (1869) 38 LJ Ch 414; *Sherratt v Mountford* (1873) 8 Ch App 928), or where it is shown that the testator treated the claimant as his own relative, and did not know of the existence of the relative by consanguinity (*Grant v Grant* (1870) LR 5 CP 380; on appeal LR 5 CP 727, Ex Ch). Certain dicta in *Grant v Grant* supra as to the meaning of 'nephew' were dissented from in *Wells v Wells* (1874) LR 18 Eq 504 at 506 and in *Merrill v Morton* (1881) 17 ChD 382 at 386, and were distinguished in *Re Taylor, Cloak v Hammond* (1886) 34 ChD 255 at 257-258, CA. 'Cousin' may be understood in the circumstances to mean the wife of a cousin: *Re Taylor, Cloak v Hammond* supra. As to acquired gender see note 3 supra; and PARA 591 ante.

12 A gift to the testator's 'first and second cousins' has in various contexts been held to include first cousins once or twice removed, and other relations not more remote in degree than second cousins: *Mayott v Mayott* (1786) 2 Bro CC 125 (where a great-niece was also included); *Silcox v Bell* (1823) 1 Sim & St 301; *Charge v Goodyear* (1826) 3 Russ 140; *Wilks v Bannister* (1885) 30 ChD 512. 'Second cousins' has been held to include first cousins once and twice removed, where no true second cousins existed: *Slade v Fooks* (1838) 9 Sim 386; *Re Bonner, Tucker v Good* (1881) 19 ChD 201. See also *Re Rickett's Trusts* (1853) 11 Hare 299 (where 'niece' was held to mean 'nephew'); *Stringer v Gardiner* (1859) 4 De G & J 468 (where a gift to 'my niece E S' went to a great-great-niece of similar name); *Weeds v Bristow* (1866) LR 2 Eq 333 (where 'nephews' included great-nephews). For the meanings of 'children', 'issue' etc see PARA 620 et seq post.

13 Thus where a husband's niece or wife's niece is described as 'my niece A', she does not necessarily take under a subsequent gift to 'my nephews and nieces': *Smith v Lidiard* (1857) 3 K & J 252; *Wells v Wells* (1874) LR 18 Eq 504; *Merrill v Morton* (1881) 17 ChD 382; *Re Green, Bath v Cannon* [1914] 1 Ch 134. Where a grand-nephew is described as 'my nephew J', he does not necessarily take under a gift to 'my nephews and nieces': *Thompson v Robinson* (1859) 27 Beav 486. See also *Re Blower's Trusts* (1871) 6 Ch App 351.

14 *Re Winn, Burgess v Winn* (1916) 86 LJ Ch 124 (where the description of certain of a wife's nieces as 'my nieces' did not bring them all into a residuary gift to 'all my nephews and nieces'); *Re Ridge, Hancock v Dutton* (1933) 149 LT 266, CA (where the description of a grand-nephew as 'nephew' did not entitle grand-nephews to share a gift to 'nephews').

15 *Hussey v Berkeley* (1763) 2 Eden 194 (where a great-granddaughter was described as 'my granddaughter'); *James v Smith* (1844) 14 Sim 214 (where 'my niece M daughter of my nephew T' was admitted to share in a gift to 'my nephews and nieces') (distinguished in *Re Ridge, Hancock v Dutton* (1933) 149 LT 266, CA).

16 *Re Cozens, Miles v Wilson* [1903] 1 Ch 138 at 142-143 (where 'my own nephews and nieces' excluded nephews by affinity previously called 'my nephew A' etc). See further PARAS 497 et seq, 513 ante.

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620. Children or issue begotten and to be begotten.

A description of children¹ or issue as 'begotten' prima facie includes children or issue to be begotten in the future; and a description of children or issue as 'to be begotten' prima facie

includes children or issue already begotten². However, by the context of the will these special meanings may be displaced, and the words may be taken to have their strictly grammatical meaning³.

1 In general, in wills made on or after 1 January 1970, 'children' includes illegitimate children: see PARAS 643-644 post.

2 Co Litt 20b; *Cook v Cook* (1706) 2 Vern 545; *Hewet v Ireland* (1718) 1 P Wms 426; *Hebblethwaite v Cartwright* (1734) Cas temp Talb 31; *Doe d James v Hallett* (1813) 1 M & S 124; *Almack v Horn* (1863) 1 Hem & M 630 at 633.

3 *Locke v Dunlop* (1888) 39 ChD 387, CA. See also *Anon* (1584) 3 Leon 87.

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621. Children.

In a will, 'children', with reference to the children of a named person¹, in its ordinary sense² refers to the first generation only of descendants by any marriage³, and does not include any grandchildren⁴ or remoter descendants⁵, but by the context and the circumstances admissible in evidence⁶ it may be extended to such other generations of descendants⁷, to the whole line capable of inheriting from the named person⁸, or to stepchildren⁹. In a will made on or after 1 January 1970, 'children' includes illegitimate children (unless the contrary intention appears)¹⁰; and, in wills made before that date, 'children' may be extended to include illegitimate children by the context and the circumstances admissible in evidence¹¹. Where a testator dies on or after 1 January 1976, 'children' includes adopted and legitimated children (subject to any contrary intention) and may include such children where the testator dies before that date¹². There is no fixed rule of construction that, where a legacy is given to 'children' of a person known by the testator to be dead at the date of the will and to have no child then living, grandchildren will take¹³.

1 As to the time of ascertainment of a class of children see PARA 593 ante.

2 As to the general rule of construction see PARA 527 ante; and as to children born as a result of artificial insemination or in vitro fertilisation see PARA 646 post.

3 This is so even though a second marriage is not in the testator's contemplation: *Champion v Pickax* (1737) 1 Atk 472; *Barrington v Tristram* (1801) 6 Ves 345; *Ex p Earl of Ilchester* (1803) 7 Ves 348 at 380; *Critchett v Taynton* (1830) 1 Russ & M 541; *Nash v Allen* (1889) 42 ChD 54 at 59. A reference to a present or future husband did not exclude a deceased husband's children in *Pasmore v Huggins* (1855) 21 Beav 103; *Re Pickup's Trusts* (1861) 1 John & H 389. The children of a prior marriage were excluded by the context in *Stavers v Barnard* (1843) 2 Y & C Ch Cas 539 (certain children of a prior marriage specially named); *Stopford v Chaworth* (1845) 8 Beav 331; *Lovejoy v Crafter* (1865) 35 Beav 149; *Re Parrott, Walter v Parrott* (1886) 33 ChD 274, CA; *Re Baynham, Hart v Mackenzie* (1891) 7 TLR 587 ('our children' in will in favour of second wife). In *Re Potter's Will Trusts* [1944] Ch 70, [1943] 1 All ER 805, CA, 'any child' included children of a second marriage.

4 *Reeves v Brymer* (1799) 4 Ves 692 at 697; *Radcliffe v Buckley* (1804) 10 Ves 195; *Thellusson v Woodford* (1829) 5 Russ 100 at 106; *Stavers v Barnard* (1843) 2 Y & C Ch Cas 539 at 540; *Loring v Thomas* (1861) 1 Drew & Sm 497 at 508.

5 *Pride v Fooks* (1858) 3 De G & J 252 at 275; *Re Atkinson, Pybus v Boyd* [1918] 2 Ch 138.

6 As to evidence for identification purposes generally see PARA 497 et seq ante.

7 Thus 'children' may be construed as 'grandchildren' where the context shows that the testator has used the word in an extended sense (*Royle v Hamilton* (1799) 4 Ves 437; *Radcliffe v Buckley* (1804) 10 Ves 195 at 201; *Re Blackman* (1852) 16 Beav 377 (name added); *Re Crawhall's Trust* (1856) 8 De GM & G 480 at 487), or where the circumstances admissible in evidence give rise to a similar inference, eg in the case of a legacy to the children of a deceased person, where at the date of the will there are, to the testator's knowledge, no children, but only grandchildren alive (*Re Smith, Lord v Hayward* (1887) 35 ChD 558 at 559 per Kay J). See also *Fenn v Death* (1856) 23 Beav 73; *Berry v Berry* (1861) 3 Giff 134; *Gale v Bennett* (1768) Amb 681 (explained in *Pride v Fooks* (1858) 3 De G & J 252 at 275-279).

'Grandchildren of any degree' may include all lawful descendants except children: *Re Hall, Hall v Hall* [1932] 1 Ch 262. 'Children' cannot, it appears, be construed as 'grandchildren' where the parent of the children is alive but has no children at the date of the will (see Hawkins on Wills (3rd Edn) 110, citing *Moor v Raisbeck* (1841) 12 Sim 123 (where, however, the context only was relied on)), or where the context of the will draws a distinction between children and grandchildren (*Loring v Thomas* (1861) 1 Drew & Sm 497 at 509); and there would be more difficulty in giving 'children' that meaning in case of a gift to the children of several persons, some of whom had children but others grandchildren only, as the court would be disinclined to give different meanings to the same word (*Radcliffe v Buckley* supra at 201; *Re Smith, Lord v Hayward* supra at 560 per Kay J). As to whether, if there are no children but grandchildren and great-grandchildren, the grandchildren may take to the exclusion of great-grandchildren see *Fenn v Death* supra (where it was so held). Cf, however, *Pride v Fooks* supra at 275-279 per Turner LJ; *Re Kirk, Nicholson v Kirk* (1885) 52 LT 346 at 348.

8 Eg in direct gifts (*Brown v Lewis* (1884) 9 App Cas 890, HL) and in gifts over (*Doe d Smith v Webber* (1818) 1 B & Ald 713; *Re Synge's Trusts* (1854) 3 I Ch R 379; *Re Milward's Estate* [1940] Ch 698). As to 'children' as a word of limitation see PARA 668 post; and as to limitations to a person and his children see PARAS 673-674 post.

9 Eg where the testator has no children and is accustomed to call his stepchildren by the name 'children': *Re Jeans, Upton v Jeans* (1895) 72 LT 835.

10 See PARAS 643-644 post.

11 See PARA 638 et seq post.

12 See PARA 645 post. An English testator cannot be supposed to have included children adopted under foreign legislation which conferred only limited rights: see *Re Marshall, Barclays Bank Ltd v Marshall* [1957] Ch 507, [1957] 3 All ER 172, CA; and CONFLICT OF LAWS vol 8(3) (Reissue) PARAS 342, 348. As to adopted children see also *Re Fletcher, Barclays Bank Ltd v Ewing* [1949] Ch 473, [1949] 1 All ER 732; *Re Gilpin, Hutchinson v Gilpin* [1954] Ch 1, [1953] 2 All ER 1218; *Re Jones's Will Trusts, Jones v Hawtin Squire* [1965] Ch 1124, [1965] 2 All ER 828; *Re Jebb, Ward-Smith v Jebb* [1966] Ch 666, [1965] 3 All ER 358, CA; *Re Brinkley's Will Trusts, Westminster Bank Ltd v Brinkley* [1968] Ch 407, [1967] 3 All ER 805; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq.

13 *Re Kirk, Nicholson v Kirk* (1885) 52 LT 346; *Re Atkinson, Pybus v Boyd* [1918] 2 Ch 138.

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622. Children of two named persons.

A gift to 'the children of A and B', where A and B are two named persons, are married to each other and have children, does not include children of one of them by a former marriage¹. Where A and B have not, and are not capable of having, children together², such a gift has been held to mean grammatically a gift to B and the children of A, and prima facie is construed accordingly³. The strict rule has been applied, however, only where the particular circumstances have admitted of no doubt that the strict construction was in complete accordance with the context and the testator's intention⁴, and it is rejected where the context or surrounding circumstances require a different construction⁵. Where both classes of children exist, it may be that the gift is to the children of A and the children of B⁶; and the fact that either A or B had no children⁷, or that A was dead and B alive at the date of the will⁸ or at the date contemplated by the gift⁹, or that A and B were relatives of the testator of the same

degree¹⁰, or that there are special reasons for B personally being a beneficiary and not his children¹¹, or that the dispositions of the will point to provision being made for the children of B¹², may affect the construction of the gift¹³. The division will usually be between all the donees per capita¹⁴.

Where there was a gift to the named persons and on the death of either to the children of each, the children of one of the named persons were held on her death to take her share to the exclusion of the children of the other¹⁵.

1 *Re Lewis's Will Trusts, Phillips v Bowkett* [1937] 1 All ER 556.

2 See *Re Walbran, Milner v Walbran* [1906] 1 Ch 64 at 66.

3 *Lugar v Harman* (1786) 1 Cox Eq Cas 250; *Peacock v Stockford* (1853) 3 De GM & G 73 at 78; *Hawes v Hawes* (1880) 14 ChD 614; *Re Featherstone's Trusts* (1882) 22 ChD 111; *Re Walbran, Milner v Walbran* [1906] 1 Ch 64; *Re Cossentine, Philp v Wesleyan Methodist Local Preachers' Mutual Aid Association Trustees* [1933] Ch 119 at 123; *Re Foster's Will Trusts, Smith v Foster* (1967) 111 Sol Jo 685. See also *Re Harper, Plowman v Harper* [1914] 1 Ch 70 at 73; *Re Dale, Mayer v Wood* [1931] 1 Ch 357 at 367; *Re Birkett, Holland v Duncan* [1950] Ch 330, [1950] 1 All ER 316.

4 *Re Dale, Mayer v Wood* [1931] 1 Ch 357 at 367.

5 *Stummvoli v Hales* (1864) 34 Beav 124 at 126 per Romilly MR; *Re Walbran, Milner v Walbran* [1906] 1 Ch 64 at 66.

6 *Mason v Baker* (1856) 2 K & J 567; *Re Davies' Will* (1860) 29 Beav 93.

7 *Wicker v Mitford* (1782) 3 Bro Parl Cas 442; *Stummvoli v Hales* (1864) 34 Beav 124.

8 In such a case B takes: *Lugar v Harman* (1786) 1 Cox Eq Cas 250 (where it was considered that 'of' should have been prefixed to 'B', if his children had been intended).

9 *Peacock v Stockford* (1853) 3 De GM & G 73 at 78.

10 *Re Walbran, Milner v Walbran* [1906] 1 Ch 64; *Re Prosser, Prosser v Griffith* [1929] WN 85.

11 *Re Harper, Plowman v Harper* [1914] 1 Ch 70.

12 *Re Dale, Mayer v Wood* [1931] 1 Ch 357.

13 See also *Re Ingle's Trusts* (1871) LR 11 Eq 578 (reference in codicil to the legacy left to B).

14 *Mason v Baker* (1856) 2 K & J 567; *Re Davies' Will* (1860) 29 Beav 93; *Re Harper, Plowman v Harper* [1914] 1 Ch 70 (notwithstanding the word 'equally'); *Re Dale, Mayer v Wood* [1931] 1 Ch 357; *Re Cossentine, Philp v Wesleyan Methodist Local Preachers' Mutual Aid Association Trustees* [1933] Ch 119. See also *Re Hall, Parker v Knight* [1948] Ch 437. In *Re Walbran, Milner v Walbran* [1906] 1 Ch 64 (followed in *Re Prosser, Prosser v Griffith* [1929] WN 85), the division was at first into moieties, the persons interested in either moiety taking that moiety between them, prima facie as joint tenants; but *Re Walbran, Milner v Walbran* supra was distinguished in *Re Harper, Plowman v Harper* supra, *Re Dale, Mayer v Wood* supra, and *Re Cossentine, Philp v Wesleyan Methodist Local Preachers' Mutual Aid Association Trustees* supra. In *Re Birkett, Holland v Duncan* [1950] Ch 330, [1950] 1 All ER 316, a stirpital distribution was made. As to distribution per capita or per stirpes see PARA 680 post.

15 *England v England* (1869) 20 LT 648.

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623. First son, eldest son etc.

The description 'first son' or 'eldest son' of a certain person in the strict sense means the first-born son¹, and similarly for other sons². The circumstances of the case and the context of the will may, however, show that the testator intended the eldest son of the person at the date of the will (which is *prima facie* the sense of the words where the strict sense is inapplicable³), or his eldest son for the time being at some future time⁴, or the son taking a family estate⁵. This last sense is normally the sense where the provision made by the will is for portions for younger children⁶ and the eldest son is excluded, 'younger children' in such a case *prima facie* being taken to mean children other than a child taking the estate⁷. It is possible that an eldest son may take under a limitation to, for example, 'second and other sons'⁸, but not where by the context of the will he is excluded⁹. Where a first or second son is dead at the date of the will, the will is construed as meaning first or second son at the testator's death¹⁰.

The fact that a person has an acquired gender does not affect the disposal or devolution of property under a will made before 4 April 2005¹¹.

1 *Bathurst v Errington* (1877) 2 App Cas 698 at 709 per Lord Cairns LC. See also *Bennett v Bennett* (1864) 2 Drew & Sm 266; *Meredith v Treffry* (1879) 12 ChD 170.

2 *Trafford v Ashton* (1710) 2 Vern 660 (second son); *Wilbraham v Scarisbrick* (1847) 1 HL Cas 167; *Lyddon v Ellison* (1854) 19 Beav 565 (where 'younger children' meant children other than the eldest). See also *Crofts v Beamish* [1905] 2 IR 349, Ir CA ('next eldest brother').

3 See *Amyot v Dwaris* [1904] AC 268, PC (treating *Re Harris's Trust* (1854) 2 WR 689 as incorrect). See also PARA 591 ante.

4 *Matthews v Paul* (1819) 3 Swan 328 (eldest at time of distribution); *Stevens v Pyle* (1861) 30 Beav 284 (eldest surviving life tenant); *Caldbeck v Caldbeck* [1911] 1 IR 144.

5 *Ellison v Thomas* (1862) 1 De GJ & Sm 18 (settlement); *Collingwood v Stanhope* (1869) LR 4 HL 43 (settlement). 'Eldest' means eldest in right in primogeniture: *Thellusson v Lord Rendlesham*, *Thellusson v Thellusson*, *Hare v Roberts* (1859) 7 HL Cas 429.

6 See SETTLEMENTS vol 42 (Reissue) PARA 727 et seq.

7 *Chadwick v Doleman* (1705) 2 Vern 528 (settlement). The eldest daughter is a younger child for this purpose: *Beale v Beale* (1713) 1 P Wms 244; *Pierson v Garnet* (1786) 2 Bro CC 38.

8 *Clements v Paske* (1784) 2 Cl & Fin 230n; *Langston v Langston* (1834) 2 Cl & Fin 194, HL; *Re Blake's Estate* (1871) 19 WR 765 (settlement); *Tavernor v Grindley* (1875) 32 LT 424; *Grattan v Langdale* (1883) 11 LR Ir 473.

9 *Locke v Dunlop* (1888) 39 ChD 387, CA. In *Tuite v Bermingham* (1875) LR 7 HL 634, the eldest was expressly excluded from the limitation.

10 *King v Bennett* (1838) 4 M & W 36.

11 See PARA 591 ante.

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624. Issue; male issue; offspring.

'Issue', in its usual legal sense, includes descendants¹ of every degree², but 'issue of our marriage' means children only³. In a devise of real estate to a person 'and his issue', especially where at the date of the will he has no issue⁴, *prima facie* 'issue' is a word of limitation⁵, and the

gift formerly created an estate tail in the devisee⁶. The word was treated as equivalent to 'heir of the body'⁷, but the context of the will might show that 'issue' was a word of description and not of limitation; the word was of flexible meaning⁸. Between 1 January 1926 and 31 December 1996 inclusive, an interest in tail could only be created by will in the same manner as by deed⁹, and the above rules apply only to wills of testators who died before 1 January 1926.

In direct gifts to issue¹⁰ as purchasers, 'issue' may mean either lineal descendants¹¹, in accordance with its ordinary meaning, or children or some particular class of descendants ascertained by reference to some particular time or event¹². The meaning is not necessarily restricted to children by a context containing a gift to children couched in similar terms¹³, or by gifts referring to issue in the sense of children¹⁴.

Under a gift to 'issue male'¹⁵, or 'male issue'¹⁶, or 'male descendants', or 'male heirs'¹⁷ as purchasers, *prima facie*¹⁸ only males claiming as descendants of males, and not of females, can take. 'Male descendants' is, however, not a term of art, and males descended from the common ancestor through females are also entitled to share¹⁹. In deciding who is 'male', the fact that a person has an acquired gender does not affect the disposal or devolution of property under a will made before 4 April 2005, but may affect it under a will made on or after that date²⁰.

'Offspring' similarly extends *prima facie* to any degree of lineal descendant²¹, but may be restricted or varied in meaning²².

1 In general, in any disposition made on or after 1 January 1970, 'issue' includes illegitimate descendants: see PARAS 643-644 post.

2 *Whythe v Thurlston* (1749) Amb 555; *Hockley v Mawbey* (1790) 1 Ves 143 at 150; *Davenport v Hanbury* (1796) 3 Ves 257 at 258 per Arden MR; *Freeman v Parsley* (1797) 3 Ves 421; *Leigh v Norbury* (1807) 13 Ves 340 at 344; *Bernard v Mountague* (1816) 1 Mer 422 at 434; *Head v Randall* (1843) 2 Y & C Ch Cas 231 at 235; *Hall v Nalder* (1852) 22 LJ Ch 242; *Ross v Ross* (1855) 20 Beav 645 at 648; *Rhodes v Rhodes* (1859) 27 Beav 413 at 416; *Surridge v Clarkson* (1866) 14 WR 979; *Re Corlass* (1875) 1 ChD 460; *Edyvean v Archer*, *Re Brooke* [1903] AC 379 at 384, PC; *Re Burnham*, *Carrick v Carrick* [1918] 2 Ch 196; *Re Sutcliffe*, *Alison v Alison* [1934] Ch 219. See also *Ralph v Carrick* (1879) 11 ChD 873 at 883, CA, per James LJ. Cf *Haydon v Wilshire* (1789) 3 Term Rep 372 at 373; and see note 8 infra.

3 *Re Noad*, *Noad v Noad* [1951] Ch 553, [1951] 1 All ER 467.

4 As to the rule in *Wild's Case* (1599) 6 Co Rep 16b see PARA 673 post.

5 See *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 878; and PARA 675 post. When qualified, however, as in 'eldest issue male', the word is *prima facie* a word of purchase: *Lovelace v Lovelace* (1585) Cro Eliz 40 (decided as to freehold lands); *Sheridan v O'Reilly* [1900] 1 IR 386 (distinguished in *Re Cosby's Estate* [1922] 1 IR 120, CA, where 'eldest issue male' gave an estate tail). See also *Re Hobbs*, *Hobbs v Hobbs* [1917] 1 Ch 569, CA (estates limited to sons and their sons successively); and REAL PROPERTY vol 39(2) (Reissue) PARA 172.

6 *Campbell v Bouskell* (1859) 27 Beav 325 at 329; *Walsh v Johnston* [1899] 1 IR 501; *Re Simcoe*, *Vowler-Simcoe v Vowler* [1913] 1 Ch 552. For cases where 'or' was changed into 'and' see *Re Clerke*, *Clowes v Clerke* [1915] 2 Ch 301; *Re Hayden*, *Pask v Perry* [1931] 2 Ch 333. Cf *W Gardiner & Co Ltd v Dessaix* [1915] AC 1096, PC (where on the construction of the will the children took estates in fee simple).

7 *Kavanagh v Morland* (1853) Kay 16 at 24; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 871-872; *Re Adams*, *Adams v Adams* (1906) 94 LT 720 at 722, CA, per Romer LJ. Similarly, in a series of limitations by will of real estate, where after a particular estate in any person a remainder was limited to his issue, 'issue' was *prima facie* a word of limitation (*King v Melling* (1671) 1 Vent 225), and the rule in *Shelley's Case* (1581) 1 Co Rep 93b applied. As to this rule, which is now abolished, see REAL PROPERTY vol 39(2) (Reissue) PARA 172.

8 See *M'Gregor v M'Gregor* (1859) 1 De GF & J 63 at 76 per Lord Campbell LC; *Bradley v Cartwright* (1867) LR 2 CP 511; *Re Birks*, *Kenyon v Birks* [1900] 1 Ch 417 at 418, CA, per Lindley LJ. 'Issue' is more flexible than 'heirs of the body': *Slater v Dangerfield* (1846) 15 M & W 263 at 273; *Kavanagh v Morland* (1853) Kay 16; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 881.

9 See the Law of Property Act 1925 s 130(1), (2) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, with effect from 1 January 1997); and PARA 671 post. Entailed interests cannot

be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. The provisions of the Family Law Reform Act 1987 ss 1, 19(1) apply to words purporting to create an entailed interest (see s 19(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 25, with effect from 1 January 1997); and PARA 644 post), but the provisions of the Family Law Reform Act 1969 s 15 (repealed) do not (see s 15(2) (repealed by the Family Law Reform Act 1987 s 33(4), Sch 4, with effect from 4 April 1988); and PARA 643 post).

10 As to gifts over in default of issue see PARA 704 post.

11 See note 1 supra.

12 *Slater v Dangerfield* (1846) 15 M & W 263 at 272; *Sandes v Cooke* (1888) 21 LR Ir 445 at 448; *Re Burnham, Carrick v Carrick* [1918] 2 Ch 196. For examples where the usual meaning, namely all descendants, was adhered to see *Dodsworth v Addy* (1842) 11 LJ Ch 382; *Re Jones' Trusts* (1857) 23 Beav 242.

13 *Waldron v Boulter* (1856) 22 Beav 284.

14 For cases where 'issue' was used in different passages in different senses see *Carter v Bentall* (1840) 2 Beav 551; *Louis v Louis* (1863) 9 Jur NS 244; *Re Warren's Trusts* (1884) 26 ChD 208; and PARA 540 ante.

15 *Lywood v Kimber* (1860) 29 Beav 38.

16 *Re Du Cros' Settlement Trusts, Du Cros Family Trustee Co Ltd v Du Cros* [1961] 3 All ER 193, [1961] 1 WLR 1252.

17 *Doe d Angell v Angell* (1846) 9 QB 328.

18 For an example where 'in the male line' was inconsistent with the donees taking as descendants of males only see *Sayer v Bradly* (1856) 5 HL Cas 873 ('nearest of kin in the male line'). In a gift to A for life and after his death to his issue 'in tail male', daughters may take, the words 'in tail male' being a description of the estate taken: *Trevor v Trevor* (1847) 1 HL Cas 239.

19 *Re Drake, Drake v Drake* [1971] Ch 179, [1970] 3 All ER 32, CA (overruling *Bernal v Bernal* (1838) 3 My & Cr 559; and not following *Allen v Crane* (1953) 89 CLR 152). In *Oddie v Woodford* (1825) 3 My & Cr 584, where the relevant words were 'male lineal descendant', it was held to the contrary, although it was recognised that, apart from the presence of the word 'lineal', the result stated in the text would follow.

20 See PARA 591 ante.

21 *Thompson v Beasley* (1854) 3 Drew 7; *Young v Davies* (1863) 2 Drew & Sm 167; *Bradshaw v Bradshaw* [1908] 1 IR 288.

22 *Lister v Tidd* (1861) 29 Beav 618 (restricted to children by a direction to settle); *Tabuteau v Nixon* (1899) 15 TLR 485.

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625. Contexts confining issue to children.

The following are examples of contexts from which the court has inferred that 'issue' has been used by the testator as meaning 'children'¹:

- 65 (1) where the testator in a later part of the will or a codicil speaks of the gift in question as a gift to children², or otherwise defines the issue taking under the gift as children³;

- 66 (2) where the testator expressly or impliedly limits 'issue' in other clauses of the same will to mean 'children', and the restriction, in the opinion of the court, applies throughout the will⁴;
- 67 (3) where in an original gift to issue the person whose issue is designated, or in a substitutional gift the first taker, is spoken of as the 'parent', 'father' or 'mother' of the issue⁵ (as, for example, where the gift to the issue is contained in a direction that they are to take the share their parent would have taken if living at the time of distribution, and the reference to the parent is construed as a reference to the first taker), but this rule of construction has been strongly criticised⁶ and is easily displaced by a context (as, for example, by the use of 'issue' in other parts of the will in such a sense as to enlarge this construction and restore the word to its original comprehensive meaning⁷), and the court is disinclined to apply the rule where there is a gift over on general failure of the issue⁸ or where the result of its application would in certain events be an entire or partial intestacy⁹;
- 68 (4) where the testator speaks of the issue of such issue, or uses other phrases showing that he contemplated issue of yet further degrees of remoteness not included in the 'issue' in question¹⁰.

1 See *Bennett v Houldsworth* [1911] WN 47. The mere fact that 'issue' of a named person is described as begotten by him is not sufficient to narrow it down to 'children': *Caulfield v Maguire* (1845) 2 Jo & Lat 141 at 178 per Sugden LC. See also *Haydon v Wilshire* (1789) 3 Term Rep 372; *Evans v Jones* (1846) 2 Coll 516 at 523; *Maddock v Legg* (1858) 25 Beav 531. Cf *Hampson v Brandwood* (1816) 1 Madd 381 (male issue, with limitation over to daughters).

2 *Goldie v Greaves* (1844) 14 Sim 348; *M'Gregor v M'Gregor* (1859) 1 De GF & J 63; *Baker v Bayldon* (1862) 31 Beav 209; *Re Hobbs, Hobbs v Hobbs* [1917] 1 Ch 569, CA. As to the general rule that the testator's will is taken as the dictionary showing his meaning see PARA 516 ante.

3 *Peel v Catlow* (1838) 9 Sim 372 (to issue 'in like manner' to previous gift to children); *Farrant v Nichols* (1846) 9 Beav 327; *Re Dean, Wollard v Dickinson* [1923] WN 227. A similar result followed where the gift was to the 'issue' in equal shares if more than one, and, if only one, the whole 'to such one child': *Bryden v Willett* (1869) LR 7 Eq 472; *Re Birks, Kenyon v Birks* [1900] 1 Ch 417 at 419, CA, per Lindley MR. See also *Re Hopkins' Trusts* (1878) 9 ChD 131.

4 *Cursham v Newland* (1838) 4 M & W 101; *Ridgeway v Munkittrick* (1841) 1 Dr & War 84; *Edwards v Edwards* (1849) 12 Beav 97; *Re Harrison's Estate* (1879) 3 LR Ir 114; *Re Birks, Kenyon v Birks* [1900] 1 Ch 417, CA; *Re Bourke's Will Trusts, Barclays Bank Trust Co Ltd v Canada Permanent Trust Co* [1980] 1 All ER 219, [1980] 1 WLR 539. See also *Reed v Braithwaite* (1870) LR 11 Eq 514; *Re Noad, Noad v Noad* [1951] Ch 553, [1951] 1 All ER 467 (where 'issue of a marriage' was confined to children).

5 This rule is known as the rule in *Sibley v Perry* (1802) 7 Ves 522, although in this case, as explained by James LJ in *Ralph v Carrick* (1879) 11 ChD 873 at 882, CA, Lord Eldon LC did not intend to lay down any general rule of construction, but was dealing only with the peculiar language of a particular will, and the case is, therefore, an example of the inference under head (2) in the text. The construction mentioned in head (3) in the text is, however, commonly applied and is, in effect, a rule: see *Pruen v Osborne* (1840) 11 Sim 132; *Pope v Pope* (1851) 14 Beav 591; *Bradshaw v Melling* (1853) 19 Beav 417; *Parsons v Coke* (1858) 4 Drew 296; *Smith v Horsfall* (1858) 25 Beav 628; *Tatham v Vernon* (1861) 29 Beav 604; *Stevenson v Abingdon* (1862) 31 Beav 305; *Lanphier v Buck* (1865) 2 Drew & Sm 484 at 492; *Martin v Holgate* (1866) LR 1 HL 175 at 184, 186; *Heasman v Pearse* (1871) 7 Ch App 275 at 282, 284; *Re Judd's Trusts* [1884] WN 206; *Re Birks, Kenyon v Birks* [1900] 1 Ch 417 at 418-419, CA (where it was not necessary to refer to *Sibley v Perry* supra to see that 'issue' meant children); *Re Timson, Smiles v Timson* [1916] 2 Ch 362, CA. The rule applies to settlements inter vivos as well as wills: *Barraclough v Shillito* [1884] WN 158.

6 *Re Hipwell, Hipwell v Hewitt* [1945] 2 All ER 476, CA.

7 *Maynard v Wright* (1858) 26 Beav 285 at 289 per Romilly MR; *Berry v Fisher* [1903] 1 IR 484 at 488; *Re Embury, Page v Bowyer* (1913) 109 LT 511 (followed in *Mousley v Rigby* [1955] Ch 139, [1954] 3 All ER 553); *Re Johnson, Pitt v Johnson* (1913) 30 TLR 200 (affd (1914) 30 TLR 505, CA); *Re Langlands, Langlands v Langlands* (1917) 87 LJ Ch 1; *Re Swain, Brett v Ward* [1918] 1 Ch 399; *Re Hipwell, Hipwell v Hewitt* [1945] 2 All ER 476, CA (where 'issue' and 'children' were used in the same clause); *Re Manly's Will Trusts, Burton v Williams* [1969] 3 All ER 1011, [1969] 1 WLR 1818; *Re Manly's Will Trusts (No 2), Tickle v Manly* [1976] 1 All ER 673.

8 *Ross v Ross* (1855) 20 Beav 645 at 651; *Ralph v Carrick* (1879) 11 ChD 873 at 884, CA.

9 *Ross v Ross* (1855) 20 Beav 645 at 652-653. See also *Ralph v Carrick* (1879) 11 ChD 873 at 882, CA, per James LJ, instancing a case where a donee's children predeceased him, leaving his grandchildren alive. In *Birdsall v York* (1859) 5 Jur NS 1237, where the circumstances were similar, it was not argued that there was an intestacy. In *Smith v Horsfall* (1858) 25 Beav 628 at 630, Romilly MR explained his decision in *Ross v Ross* supra by saying that in the latter case issue was confined to the children of the 'parent', but that the 'parent' might be a grandchild.

10 *Pope v Pope* (1851) 14 Beav 591 at 594 per Romilly MR; *Fairfield v Bushell* (1863) 32 Beav 158.

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626. Ascertainment of class of issue.

The class of issue is ascertained according to the testator's declared intention¹, and, where this is not otherwise shown, then, according to the ordinary rules, at his death², letting in issue coming into existence before the period of distribution³, and every degree of issue taking concurrently with their descendants. Prima facie they take per capita⁴, and, in the absence of words of severance or other inconsistent context⁵, as joint tenants⁶.

1 *Waldron v Boulter* (1856) 22 Beav 284 (issue of each grandchild ascertained at his death).

2 See PARA 593 ante.

3 *Butter v Ommoney* (1827) 4 Russ 70; *Clay v Pennington* (1835) 7 Sim 370; *Weldon v Hoyland* (1862) 4 De GF & J 564; *Hobgen v Neale* (1870) LR 11 Eq 48; *Surridge v Clarkson* (1866) 14 WR 979; *Re Corlass* (1875) 1 ChD 460; *Berry v Fisher* [1903] 1 IR 484; *Re Taylor's Trusts, Taylor v Blake* [1912] 1 IR 1.

4 *Davenport v Hanbury* (1796) 3 Ves 257; *Re Jones' Trusts* (1857) 23 Beav 242; *Weldon v Hoyland* (1862) 4 De GF & J 564. As to distribution per capita see PARA 680 post.

5 *Law v Thorp* (1858) 4 Jur NS 447 (with 'benefit of survivorship and accruer of surviving shares').

6 *Davenport v Hanbury* (1796) 3 Ves 257; *Surridge v Clarkson* (1866) 14 WR 979.

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627. Descendants.

Whatever may have been its meaning in earlier times¹, 'descendants' now ordinarily refers to children, grandchildren and other issue² of every degree of remoteness³ in descent. Although the word may be confined to mean children by a sufficiently strong context⁴, the court does not restrict the word to that sense merely because the testator speaks of the descendants taking their parents' share⁵. The class of descendants taking under a gift is ascertained according to the ordinary rules for ascertaining a class⁶. When ascertained, the descendants prima facie take per capita and not per stirpes⁷; but, in a gift to a group of persons or their descendants, the descendants prima facie take by way of substitution only, and not in competition with their parents, if living at the time of distribution⁸.

1 Over a century ago 'descendants' was apparently apt, not merely in legal language but even in popular parlance, to include collateral relations (see *Best v Stonehewer* (1864) 34 Beav 66; affd (1865) 2 De GJ & Sm 537), but not now (see *Re Thurlow, Riddick v Kennard* [1972] Ch 379 at 383, [1972] 1 All ER 10 at 13).

2 *Oddie v Woodford* (1821) 3 My & Cr 584 at 617 ('posterity of all kinds'). A gift to the donee and descendants of his branch of the family did not before 1 January 1926 create an entailed interest (*Re Brownlie, Brownlie v Muxaux* [1938] 4 All ER 54), and between 1 January 1926 and 31 December 1996 inclusive could not do so (see PARA 668 et seq post). In general, in any disposition made on or after 1 January 1970, 'descendants' includes illegitimate descendants: see PARAS 643-644 post. In dispositions made before that date, 'descendants' excluded illegitimate persons: *Sydall v Castings Ltd* [1967] 1 QB 302, [1966] 3 All ER 770, CA. See further PARA 638 et seq post.

3 Such a description, the members being ascertained according to the ordinary rules, is not void for uncertainty: *Pierson v Garnet* (1786) 2 Bro CC 38, 226.

4 *Smith v Pepper* (1859) 27 Beav 86 ('in proportions . . . under the Statute of Distribution'); *Williamson v Moore* (1862) 8 Jur NS 875 ('my nephews and nieces being descendants of my brothers and sisters'). Cf *Legard v Haworth* (1800) 1 East 120 at 130 (restricted to children and grandchildren); *Re Hickey, Beddoes v Hodgson* [1917] 1 Ch 601 ('descendants' or 'their descendants').

5 *Ralph v Carrick* (1879) 11 ChD 873, CA (where the court refused to apply the rule in *Sibley v Perry* (1802) 7 Ves 522 (see PARA 625 note 5 ante)); *Re Manly's Will Trusts (No 2), Tickle v Manly* [1976] 1 All ER 673.

6 *Tucker v Billing* (1856) 2 Jur NS 483; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520, CA. As to gifts to classes see PARAS 464, 593 et seq ante.

7 *Crosley v Clare* (1761) 3 Swan 320n; *Butler v Stratton* (1791) 3 Bro CC 367; *Re Flower, Matheson v Goodwyn* (1890) 62 LT 216 (revsd on another point 63 LT 201, CA). See also *Rowland v Gorsuch, Price v Gorsuch* (1789) 2 Cox Eq Cas 187 (where the context required a stirpital distribution). Cf *Re Rawlinson, Hill v Withall* [1909] 2 Ch 36. As to distribution per capita and per stirpes see PARA 680 et seq post.

8 *Jones v Torin* (1833) 6 Sim 255; *Dick v Lacy* (1845) 8 Beav 214; *Re Flower, Matheson v Goodwyn* (1890) 62 LT 216; *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 227, 231, CA; *Re Manly's Will Trusts (No 2), Tickle v Manly* [1976] 1 All ER 673. The position is similar in the case of a gift to a group of individuals and their descendants: *Tucker v Billing* (1856) 2 Jur NS 483.

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628. Heir or heirs.

A gift to the 'heir' or 'heirs'¹ of any person takes effect in favour of the person or persons who satisfy that description at some particular time². The words 'the heir of the body' or 'heirs of the body' of any person have corresponding meanings³.

In a direct gift to the heir where the ancestor is living, as no one can be the heir of a living person, the technical meaning may be displaced, and the person who is heir presumptive may be designated⁴. Otherwise the heir is prima facie ascertained at the ancestor's death, whether the ancestor is the testator or any other person, and whether the gift is immediate or future⁵.

1 Descent to the heir has in general been abolished: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 584, 638. References to the 'heir' were effective to create interests in tail between 1 January 1926 and 31 December 1996 inclusive (see the Law of Property Act 1925 s 130(1), (2) (repealed); and PARA 671 post), or to confer equitable interests on an heir taking by purchase, that is, otherwise than by descent (see s 132; the Administration of Estates Act 1925 s 51(1); para 630 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 631-632). By virtue of the Law of Property (Amendment) Act 1924 s 9, Sch 9, the Inheritance Act 1833 (as amended by the Law of Property Amendment Act 1859 s 19) (see EXECUTORS AND ADMINISTRATORS vol 17(2)

(Reissue) PARA 638 et seq) remains in force (although otherwise repealed) for the purpose of ascertaining the devolution of entailed interests and persons taking as heirs by purchase under such limitations. As to the circumstances in which before 1 January 1926 an heir was construed as taking by purchase see eg *Re Hussey and Green's Contract* [1921] 1 Ch 566; and REAL PROPERTY vol 39(2) (Reissue) PARA 172. Before 1 January 1926 a person who was at once the devisee of land under the will of a testator and the heir of the testator took the land as purchaser: see the Inheritance Act 1833 s 3 (repealed); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 640. For the meaning of 'heir' in bequests of personal estate or a mixed fund see PARA 630 post.

2 *Archer's Case, Baldwin v Smith* (1597) 1 Co Rep 66b; *Evans v Evans* [1892] 2 Ch 173, CA (conveyance); *Skinner v Gumbleton* [1903] 1 IR 36. A donee's husband does not take under an alternative gift to her 'heir': *Re Boyer, Neathercoat v Lawrence* [1935] Ch 382.

3 See *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658, HL; *Wesselenyi v Jamieson* [1907] AC 440, HL (heir in entail under a settlement, the entail in which had been destroyed). A devise to the heirs of the body of a deceased person formerly created an estate tail, the first of such heirs who becomes entitled taking by purchase: see *Mandeville's Case* (1328) Co Litt 26b; and REAL PROPERTY vol 39(2) (Reissue) PARA 424. The form of the limitation seems to show a contrary intention so as to prevent the fee simple passing under the Wills Act 1837 s 28 (see PARA 660 post), but the point has not been decided. A devise to 'my own right heirs except' A (where A is in fact the heir) is ineffectual: *Re Smith, Bull v Smith* [1933] Ch 847 (following *Pugh v Goodtitle* (1787) 3 Bro Parl Cas 454).

4 *Doe d Winter v Perratt* (1843) 6 Man & G 314 at 363, HL, per Lord Brougham LC; *Dormer v Phillips* (1855) 4 De GM & G 855. See also *James v Richardson* (1677) 2 Lev 232; T Jo 99 (affd (1678) Freem KB 472n, HL); *Darbison v Beaumont* (1714) 1 P Wms 229; *Goodright d Brooking v White* (1775) 2 Wm Bl 1010; *Re Hooper, Hooper v Carpenter* [1936] Ch 442, [1936] 1 All ER 277, CA.

5 *Danvers v Earl of Clarendon* (1681) 1 Vern 35; *Doe d Pilkington v Spratt* (1833) 5 B & Ad 731; *Rawlinson v Wass* (1852) 9 Hare 673; *Re Frith, Hindson v Wood* (1901) 85 LT 455; *Re Maher, Maher v Toppin* [1909] 1 IR 70 at 76, Ir CA. In *Lightfoot v Maybery* [1914] AC 782, HL, the heir was, in the context, held to be ascertainable on the death of the life tenant. As to the heir being ascertainable on an event which gives rise to an executory devise over in his favour see *Doe d King v Frost* (1820) 3 B & Ald 546. In *Re Hooper, Hooper v Carpenter* [1936] Ch 442, [1936] 1 All ER 277, CA, where the gift was to 'such person as shall at the death of my wife be my heir' and the testator's wife predeceased him, the heir was ascertained as if the testator had died at the same time as his wife. See also *Lucas-Tooth v Lucas-Tooth* [1921] 1 AC 594, HL (bequest of stock to the testator's two brothers for life only, and then 'to the heir to the baronetcy at present held by Sir R L'; heir to be ascertained on the death of the survivor of the two brothers).

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629. Heir of particular character.

'Heir' prima facie refers to descent at common law¹, but there may be a devise to heirs of a particular character², which, if not referring merely to the descent of an estate tail³, takes effect only in favour of the heirs general conditionally on their possessing that character, unless the testator's intention is shown to the contrary⁴.

1 This was so under the former law, even where copyhold, gavelkind or borough English land was given to the heir of the testator, and prima facie the common law heir, according to the general course of descent, was entitled: *Thorp v Owen* (1854) 2 Sm & G 90; *Davis v Kirk* (1856) 2 K & J 391; *Polley v Polley (No 2)* (1862) 31 Beav 363; *Sladen v Sladen* (1862) 2 John & H 369; *Garland v Beverley* (1878) 9 ChD 213; *Re Smith, Bull v Smith* [1933] Ch 847. See also Co Litt 10a. As all special customs of descent are abolished (see the Administration of Estates Act 1925 s 45(1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 583-585), the 'heir' is the heir ascertained under the Inheritance Act 1833 (see PARA 628 note 1 ante), unless some other form of heirship is specified in the will. Cf *Re Higham, Higham v Higham* [1937] 2 All ER 17.

2 Eg to the testator's heirs of his name: *Couden v Clerke* (1612) Hob 29; *Wrightson v Macaulay* (1845) 14 M & W 214; *Thorpe v Thorpe* (1862) 1 H & C 326.

3 Eg in a devise to 'heirs male' construed in the context to mean 'heirs male of the body': see PARA 671 post.

4 In Co Litt 24b it is said that under a devise to 'heirs female of the body' the person to take by purchase under the gift must be heir general as well as heir female, but this was not considered correct: see *Newcoman v Bethlem Hospital* (1741) Amb 8 App 785; *Goodtitle d Weston v Burtenshaw* (1772) 1 Fearn on Contingent Remainders (10th Edn) 570-573; *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 106-107; *Doe d Angell v Angell* (1846) 9 QB 328 at 351; *Wrightson v Macaulay* (1845) 14 M & W 214 at 231; *Doe d Winter v Perratt* (1826) 5 B & C 48 at 93 (affd (1843) 9 Cl & Fin 606 at 617, 625, HL). See also Hargrave notes to Co Litt 24b (note (3)), 164a (note (2)); *Chambers v Taylor* (1837) 2 My & Cr 376 at 386. As to a devise to the 'heirs male of the body', where these are words of description and not of limitation (see PARA 671 post) see *Wills v Palmer* (1770) 5 Burr 2615; *Doe d Angell v Angell* supra. See also *Baker v Wall* (1697) 1 Ld Raym 185; *Brown v Barkham* (1717) 1 Stra 35 (on a bill of review in *Newcoman v Bethlem Hospital* supra); *Dawes v Ferrers* (1722) 2 P Wms 1; *Re Watkins, Maybery v Lightfoot* [1912] 2 Ch 430 at 436 (ultimately reversed sub nom *Lightfoot v Maybery* [1914] AC 782, HL, where it was held that the expression 'my nearest male heir' was not used in a technical sense, but meant the testator's nearest male relative).

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630. Bequest of personalty or mixed fund to heir.

Where a gift is of personal estate or of a mixed fund of real and personal estate, 'heir' prima facie retains its usual meaning, and, unless there is something in the will to show a contrary intention, the particular person filling the description of heir-at-law takes the property as a designated person¹. In a gift of personal estate alone, 'heirs' has been construed as meaning either next of kin², the widow taking her share³, or executors and administrators⁴. The context may, however, give other meanings to the word⁵. In a will coming into operation after 31 December 1925 a limitation of personal estate in favour of the heir of a deceased person operates in favour of the person who, under the law in force before 1 January 1926, would have answered the description of the heir of the deceased in respect of his freehold land⁶. 'Heirs' could properly be used for limitations of entailed interests in personal as well as in real property⁷.

1 *Gwynne v Muddock* (1808) 14 Ves 488; *Mounsey v Blamire* (1828) 4 Russ 384; *Tetlow v Ashton* (1850) 15 Jur 213; *De Beauvoir v De Beauvoir* (1852) 3 HL Cas 524 at 557, HL, per Lord St Leonards LC; *Southgate v Clinch* (1858) 4 Jur NS 428; *Re Rootes* (1860) 1 Drew & Sm 228; *Hamilton v Mills* (1861) 29 Beav 193; *Smith v Butcher* (1878) 10 ChD 113; *Keay v Boulton* (1883) 25 ChD 212 at 215 per Pearson J; *Skinner v Gumbleton* [1903] 1 IR 36. See also *Boydell v Golightly* (1844) 14 Sim 327 at 346-347 (where the heir was also next of kin). As to a gift to 'my successors to the titles' see *Re Earl Cathcart* (1912) 56 Sol Jo 271. As to severing the meaning under the former law so that 'heirs' might mean heirs-at-law as to real estate and next of kin as to personal estate see *Vaux v Henderson* (1806) 1 Jac & W 388; *Gittings v M'Dermott* (1834) 2 My & K 69; *Mounsey v Blamire* supra at 387; *Wingfield v Wingfield* (1878) 9 ChD 658. Cf *Lowndes v Stone* (1799) 4 Ves 649 (gift of residue to 'next of kin or heir-at-law'); *Re Thompson's Trusts* (1878) 9 ChD 607 (to 'heirs or next of kin'). In *De Beauvoir v De Beauvoir* supra the context showed that the person who was to take the real estate was intended also to take the personal estate.

2 *Low v Smith* (1856) 2 Jur NS 344; *Doddy v Higgins* (1856) 2 K & J 729; *Re Gamboa's Trusts* (1858) 4 K & J 756; *Re Newton's Trusts* (1867) LR 4 Eq 171 (gift to 'heirs and assigns'); *Re Philps' Will* (1868) LR 7 Eq 151.

3 *Re Steevens' Trusts* (1872) LR 15 Eq 110.

4 *Lachlan v Reynolds* (1852) 9 Hare 796 at 798.

5 Eg children (*Loveday v Hopkins* (1755) Amb 273; *Wilson v Vansittart* (1770) Amb 562; *Symers v Jobson* (1848) 16 Sim 267 ('the heirs of her body')); *Bull v Comberbach* (1858) 25 Beav 540) or issue (*Speakman v Speakman* (1850) 8 Hare 180 at 185).

6 See the Law of Property Act 1925 s 132; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 631-634. See also *Re Bourke's Will Trusts, Barclays Bank Trust Co Ltd v Canada Permanent Trust Co* [1980] 1 All ER 219, [1980] 1 WLR 539.

7 See the Law of Property Act 1925 s 130(1), (2) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, with effect from 1 January 1997); para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

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631. A person or his heirs.

A gift to a named person or his heirs is prima facie substitutional in the case of personal estate, 'heirs' being read as next of kin¹. If the subject of the gift consists both of real and personal estate², 'heirs' is construed according to the nature of the property; the heirs of realty take the real estate, and the heirs of personalty, that is the next of kin, the personalty³. In wills before the Wills Act 1837 in a devise to a named person or his heirs, 'or' was changed into 'and', and 'heirs' was treated as a word of limitation, so that the devisee took an estate in fee⁴. This construction has been followed in regard to wills since that Act⁵.

1 *Hamilton v Mills* (1861) 29 Beav 193 at 198 per Romilly MR; *Re Ibbetson, Ibbetson v Ibbetson* (1903) 88 LT 461 at 462; *Re Whitehead, Whitehead v Hemsley* [1920] 1 Ch 298 at 304. See also *Girdlestone v Doe* (1828) 2 Sim 225; *Doody v Higgins* (1852) 8 Hare App 1, xxxii; *Jacobs v Jacobs* (1853) 16 Beav 557; *Re Craven* (1857) 23 Beav 333; *Re Philps' Will* (1868) LR 7 Eq 151; *Finlason v Tatlock* (1870) LR 9 Eq 258. The husband of a married woman did not take under 'or her heirs' as, before 1 January 1926, he took by reason of his marital right and not as next of kin: *Re Boyer, Neathercoat v Lawrence* [1935] Ch 382 (following *Doody v Higgins* (1856) 2 K & J 729 at 738; and not *Walker v Cusin* [1917] 1 IR 63). As to substitutional gifts generally see PARA 612 ante.

2 *Wingfield v Wingfield* (1878) 9 ChD 658; *Re Whitehead, Whitehead v Hemsley* [1920] 1 Ch 298.

3 *Wingfield v Wingfield* (1878) 9 ChD 658.

4 *Read v Snell* (1743) 2 Atk 642 at 645; *Wright v Wright* (1750) 1 Ves Sen 409 at 411.

5 *Harris v Davis* (1844) 1 Coll 416 (where 'or to their lawful heirs' was construed to mean 'heirs of the body'); *Greenway v Greenway* (1860) 2 De GF & J 128 ('or the heirs of their bodies'). See also *Lachlan v Reynolds* (1852) 9 Hare 796; *Re Walton's Estate* (1856) 8 De GM & G 173; *Polley v Polley* (1861) 29 Beav 134; *Re Boyer, Neathercoat v Lawrence* [1935] Ch 382. Cf *Adshead v Willetts* (1861) 29 Beav 358 (change not made because not necessary). In *Re Walton's Estate* supra there was a gift (after a life estate) of proceeds of sale among the testator's five named children 'or their heirs and assigns', and the children took absolutely on his death. See also *Re Masterton, Trevanion v Dumas* [1902] WN 192, CA. On the question whether the Wills Act 1837 s 29 (see PARA 740 post) altered the construction, changing 'or' into 'and' see *Re Clerke, Clowes v Clerke* [1915] 2 Ch 301; *Re Whitehead, Whitehead v Hemsley* [1920] 1 Ch 298; *Re Hayden, Pask v Perry* [1931] 2 Ch 333. In a gift over of a leasehold farm on the death of the devisee without lawful heirs, it was held in the context that this meant without next of kin being children or descendants: *Gray v Gray* [1915] 1 IR 261.

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632. Next of kin.

Under a gift to the next of kin¹ of any person², simply and without reference either to intestacy or to the Statutes of Distribution³, now replaced by the provisions as to succession on intestacy contained in the Administration of Estates Act 1925⁴, the donees are considered to be the nearest kindred in blood⁵, including the half-blood⁶, and not to be the statutory next of kin; and prima facie they take as joint tenants. The same meaning is attached prima facie to descriptions similar to next of kin⁷. In a gift to the next of kin of two persons, prima facie the donees are a class composed of the next of kin of one together with the next of kin of the other⁸, but, according to the context, may be such persons as are common to the two classes of next of kin⁹.

1 Cf generally the cases as to the construction of settlements, and particularly as to gifts to the next of kin of a married woman as if she had died unmarried, cited in SETTLEMENTS vol 42 (Reissue) PARA 932 et seq. As to the time of ascertaining the class of next of kin see PARA 552 ante.

2 See *Robson v Ibbs* (1837) 6 LJ Ch 213 (where the context supplied the want of mention of the person in question).

3 As to the former Statutes of Distribution, which were in force for deaths occurring before 1 January 1926 see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 635 et seq. As to what is a sufficient reference to the statutes see *Harris v Newton* (1877) 46 LJ Ch 268. A gift to persons entitled under the former Statutes of Distribution did not include benefits under the Intestates' Estates Act 1890: *Re Morgan, Morgan v Morgan* [1920] 1 Ch 196.

4 In the Administration of Estates Act 1925 Pt IV (ss 45-52) (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

5 *Brandon v Brandon* (1819) 3 Swan 312 (settlement); *Elmsley v Young* (1835) 2 My & K 780 (settlement); *Withy v Mangles* (1843) 10 Cl & Fin 215, HL (settlement) (applied to wills in *Avison v Simpson* (1859) John 43); *Halton v Foster* (1868) 3 Ch App 505; *Re Bulcock, Ingham v Ingham* [1916] 2 Ch 495 ('nearest of kin to myself'); *Re Tuckett's Will Trusts, Williams v National Provincial Bank Ltd* (1967) 111 Sol Jo 811.

6 *Cotton v Scarancke* (1815) 1 Madd 45 (explained in *Halton v Foster* (1868) 3 Ch App 505); *Brigg v Brigg* (1885) 33 WR 454; *Re Fergusson's Will* [1902] 1 Ch 483.

7 *Harris v Newton* (1877) 46 LJ Ch 268 ('legal or next of kin').

8 *Re Soper, Naylor v Kettle* [1912] 2 Ch 467.

9 *Pycroft v Gregory* (1829) 4 Russ 526. As to the effect of the context see *Williams v Ashton* (1860) 1 John & H 115 at 119-120 ('nearest of kin by kinship'; heir held entitled). See also *Sayer v Bradly* (1856) 5 HL Cas 873.

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633. Reference to rules of distribution.

If a will describes the donees by reference to the statutory rules, either expressly or impliedly (as, for example, where the distribution is to be as on an intestacy), the distribution may be under either the former law or the new law. References to any Statutes of Distribution in a will coming into operation after 31 December 1925 are to be construed as references to the provisions for the distribution of residuary estates of intestates¹, and references in such a will to statutory next of kin are to be construed, unless the context otherwise requires, as referring to the persons who would take beneficially under those provisions². Trusts declared in a will which

came into operation before 1 January 1926 by reference to the former Statutes of Distribution are, unless the contrary thereby appears, to be construed by reference to those former statutes³. Hence, in general, the former Statutes of Distribution apply where the trust is created by the will of a testator who died before 1 January 1926, even though the event which brings the trust into effect occurs after 31 December 1925⁴; and also where the will, although coming into operation after 31 December 1925, declares trusts by reference to a settlement made before 1 January 1926⁵. Prima facie⁶, a wife⁷ or husband⁸ was not included in 'next of kin', either apart from the Statutes of Distribution or under them, but it is otherwise for the purposes of the present legislation⁹.

1 In the Administration of Estates Act 1925 Pt IV (ss 45-52) (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq. In a suitable context 'statutory next of kin' may designate a hypothetical class: *Re Krawitz's Will Trusts*, *Krawitz v Crawford* [1959] 3 All ER 793 at 797, [1959] 1 WLR 1192 at 1196.

2 Administration of Estates Act 1925 s 50(1). In relation to a will coming into operation after 31 December 1952, references to Pt IV (as amended) are to be construed as including references to the Intestates' Estates Act 1952 Pt I (ss 1-6) (as amended), Schs 1, 2 (s 6(2)) and, in relation to a will coming into operation on or after 1 January 1996, references to Pt IV (as amended) are to be construed as including references to the Law Reform (Succession) Act 1995 s 1 (s 1(4)). See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 635.

3 Administration of Estates Act 1925 s 50(2). As to the former Statutes of Distribution see PARA 632 ante.

4 *Re Sutcliffe*, *Sutcliffe v Robertshaw* [1929] 1 Ch 123; *Re Sutton, Evans v Oliver* [1934] Ch 209. Cf *Re Vander Byl*, *Fladgate v Gore* [1931] 1 Ch 216. There is no contrary intention where there is nothing more than a declaration of trust by reference to the statutes: *Re Hooper's Settlement*, *Phillips v Lake* [1943] Ch 116, [1943] 1 All ER 173, CA. Cf SETTLEMENTS vol 42 (Reissue) PARA 935.

5 *Re Walsh*, *Public Trustee v Walsh* [1936] 1 All ER 327, CA.

6 See *Re Collins' Trust* [1877] WN 87 (widow included in the context).

7 *Garrick v Lord Camden*, *Patton v Jones* (1807) 14 Ves 372 at 385; *Lee v Lee* (1860) 1 Drew & Sm 85; *Re Parry*, *Leak v Scott* [1888] WN 179; *Re Fitzgerald's Trusts* (1889) 61 LT 221 ('next of kin in blood'; a case of a settlement). See also SETTLEMENTS vol 42 (Reissue) PARA 935. Where, however, the donees are the persons who by virtue of the statute would be entitled to the testator's estate, the widow is included: *Martin v Glover* (1844) 1 Coll 269; *Jenkins v Gower* (1846) 2 Coll 537.

8 *Milne v Gilbert*, *Milne v Milne*, *Milne v Walker* (1852) 2 De GM & G 715; *Walker v Cusin* [1917] 1 IR 63.

9 See SETTLEMENTS vol 42 (Reissue) PARA 935; and *Re Gilligan* [1950] P 32 at 37, [1949] 2 All ER 401 at 405.

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634. Wife or husband.

Where a donee is described as the wife of a person, and that person is married at the date of the will, then, in the absence of a context to the contrary, the wife existing at the date of the will prima facie is intended to take, and not any subsequent wife¹. The fact that the interest conferred is only during widowhood, after a life estate to the husband², or that it is expressed to be given for the support of the wife and her husband and his children³, does not of itself show any contrary intention. If the context shows that intention, or the circumstances so indicate, 'wife' may include a subsequent wife⁴, a person not married to the testator or other person whose wife she is said to be⁵, or a woman living with a man as his wife⁶.

Similar rules apply to 'husband'⁷.

1 *Garratt v Niblock* (1830) 1 Russ & M 629; *Re Drew, Drew v Drew* [1899] 1 Ch 336 at 339 per Stirling J (followed in *Re Coley, Hollinshead v Coley* [1903] 2 Ch 102 at 104, 109, CA); *Re D'Oyley, Swayne v D'Oyley* (1921) 152 LT Jo 259. See also *Re Hancock, Malcolm v Burford-Hancock* [1896] 2 Ch 173, CA (settlement). As to a gift to the 'widow' of any person cf *Re Lory* (1891) 7 TLR 419. Where there is no wife at the date of the will or at the testator's death, the first person to answer the description is presumed to be intended: see *Re Hickman, Hickman v Hickman* [1948] Ch 624, [1948] 2 All ER 303.

2 *Re Coley, Hollinshead v Coley* [1903] 2 Ch 102 at 104 per Kekewich J. See also the cases cited in note 3 infra.

3 *Boreham v Bignall* (1850) 8 Hare 131 (followed in *Re Burrow's Trusts* (1864) 10 LT 184; *Firth v Fielden* (1874) 22 WR 622). Cf *Re Lyne's Trust* (1869) LR 8 Eq 65 (which, although followed in *Re Lory* (1891) 7 TLR 419, was not followed in *Firth v Fielden* supra and was disapproved in *Re Griffiths' Policy* [1903] 1 Ch 739); *Re Coley, Hollinshead v Coley* [1903] 2 Ch 102.

4 *Longworth v Bellamy* (1871) 40 LJ Ch 513; *Re Drew, Drew v Drew* [1899] 1 Ch 336 (in both cases a discretionary trust, after a determinable life interest, for the benefit of the donee, his wife and children was relied on as excluding the rule). See also *Peppin v Bickford* (1797) 3 Ves 570 (person not married until after death of testator; second wife included); *Re Hardyman, Teesdale v McClintock* [1925] Ch 287. In such cases, prima facie no one can take who is not at the death of the named person in the position of his legal wife, and a divorce disentitles her: *Re Morrieson, Hitchens v Morrieson* (1888) 40 ChD 30; *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA; *Re Slaughter, Trustees Corp Ltd v Slaughter* [1945] Ch 355, [1945] 2 All ER 214. Cf *Bullmore v Wynter* (1883) 22 ChD 619. See also *Bosworthick v Clegg* (1929) 45 TLR 438; *Re Allan, Allan v Midland Bank Executor and Trustee Co Ltd* [1954] Ch 295, [1954] 1 All ER 646, CA.

5 In the following cases, the circumstances showed that a mistress or partner in an invalid marriage was denoted by the term 'wife': *Giles v Giles, Penfold v Penfold* (1836) 1 Keen 685; *Doe d Gains v Rouse* (1848) 5 CB 422 (cases where the name of the so-called wife was added); *Pratt v Mathew* (1856) 22 Beav 328 at 337; *Re Petts* (1859) 27 Beav 576; *Turner v Brittain* (1863) 3 New Rep 21; *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA; *Anderson v Berkley* [1902] 1 Ch 936; *Re Wagstaff, Wagstaff v Jalland* [1908] 1 Ch 162, CA; *Re Hammond, Burniston v White* [1911] 2 Ch 342; *Re Smalley, Smalley v Scotton* [1929] 2 Ch 112, CA (where the lawful wife was living); *Re Lynch, Lynch v Lynch* [1943] 1 All ER 168 ('wife', 'widowhood' and 'remarriage' made applicable to spinster by testator's own dictionary).

6 *Re Brown, Golding v Brady* (1910) 26 TLR 257.

7 *Franks v Brooker* (1860) 27 Beav 635; *Radford v Willis* (1871) 7 Ch App 7; *Peasley v Governors of Haileybury and Imperial Service College* [2001] WTLR 1365. In *Re Bryan's Trust* (1851) 2 Sim NS 103, the context referred to a named husband. In *Nash v Allen* (1889) 42 ChD 54, by the context the description meant 'husband surviving her'. A gift to the husband of an unmarried woman, if there is no such person either at the date of the will or at the testator's death, takes effect in favour of her husband if and when she marries: *Blount v Crozier* [1917] 1 IR 461. A divorced husband was held not to be a 'surviving husband' in *Bosworthick v Clegg* (1929) 45 TLR 438; approved in *Re Williams' Settlement, Greenwell v Humphries* [1929] 2 Ch 361, CA.

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635. During widowhood.

If a gift is to the wife, who is accurately so described, expressly 'during widowhood', those words form a condition as to the beginning and ending of her interest, so that the effect of a subsequent divorce before the gift takes effect is that she is disentitled to the gift, as she does not then become a widow¹. If she is not accurately so described, the words may be read as meaning 'until death or remarriage'².

¹ *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA; *Re Kettlewell, Jones v Kettlewell* (1907) 98 LT 23.

2 *Re Wagstaff, Wagstaff v Jalland* [1908] 1 Ch 162, CA; *Re Hammond, Burniston v White* [1911] 2 Ch 342. Cf *Re Gale* [1941] Ch 209, [1941] 1 All ER 329 (following *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA). As to marriages or remarriages which are subsequently annulled see PARA 664 post.

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636. Family, friends or dependants.

A gift in the will of a married man to his family, or a gift of personalty alone¹ to the family of any person, is prima facie a gift to his children², who prima facie take as joint tenants³, or, if there are no children, to all such persons as would in the case of his intestacy be entitled to take his personal estate⁴.

In differing circumstances⁵, 'family' may also mean a man's household consisting of himself, his wife, children and servants⁶; or his wife and children⁷; or his next of kin⁸; or his genealogical stock⁹. The word may include any relative whatever, where used to denote the objects of a power of appointment¹⁰ or the grantees of an option¹¹, or descendants of every degree¹².

In a devise of realty to any named family or the family of any person, the head of the family, or the eldest son and heir presumptive of that person, is prima facie designated, according to the circumstances¹³.

Where the family is defined merely by a surname, the court may ascertain from the circumstances of the case what family of that surname was best known to the testator, and the persons to take may be determined accordingly¹⁴.

Where none of these meanings can be given consistently with the will, then, in default of evidence as to the testator's intention¹⁵, the gift may be void for uncertainty¹⁶.

So long as it is not necessary, in order to ascertain the quantum of the intended benefit, to establish the totality of the members of the class, a gift to 'friends' is valid¹⁷. For this purpose, the relationship must have been a long-standing one, must have been a social as opposed to a business or professional relationship, and, when and if circumstances permitted, there must have been frequent meetings¹⁸.

'Dependants' in a will has been held too uncertain in meaning for the court to give effect to it¹⁹.

1 For this purpose, 'personalty' includes the proceeds of sale of real estate held on trust for sale, if the doctrine of conversion applies: *Woods v Woods* (1836) 1 My & Cr 401 at 408. The doctrine of conversion, whereby land held by trustees subject to a trust for sale is regarded as personal property, has been abolished, except where the trust for sale was created by the will of a testator who died before 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is, however, not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq. The same rule may be applicable to a mixed fund of real and personal estate (*Barnes v Patch* (1803) 8 Ves 604), or to real estate devised alone (*Reay v Rawlinson* (1860) 29 Beav 88; *Burt v Hellyar* (1872) LR 14 Eq 160).

2 *Beales v Crisford* (1843) 13 Sim 592; *Wood v Wood* (1843) 3 Hare 65; *Re Parkinson's Trust* (1851) 1 Sim NS 242 at 245; *Gregory v Smith* (1852) 9 Hare 708; *Re Terry's Will* (1854) 19 Beav 580; *Pigg v Clarke* (1876) 3 ChD 672; *Re Hutchinson and Tenant* (1878) 8 ChD 540 at 541 per Jessel MR; *Re Muffett, Jones v Mason* (1886) 55 LT 671. See also *Barnes v Patch* (1803) 8 Ves 604; *Re Mulqueen's Trusts* (1881) 7 LR 127; *Harkness v Harkness* (1905) 9 OLR 705; *Re M'Cann, Donnelly v Moore* [1916] 1 IR 255. Other relatives are prima facie excluded: *Wood v Wood* supra; *Burt v Hellyar* (1872) LR 14 Eq 160; *Re Battersby's Trusts* [1896] 1 IR 600. As to the ascertainment of the class see *Re Parkinson's Trust, ex p Thompson* (1851) 1 Sim NS 242.

3 *Beales v Crisford* (1843) 13 Sim 592; *Gregory v Smith* (1852) 9 Hare 708 at 712. For a case where the children were held to take as tenants in common see *Owen v Penny* (1850) 14 Jur 359.

4 *Doe d Chattaway v Smith* (1816) 5 M & S 126 at 130 per Lord Ellenborough CJ; *Grant v Lynam* (1828) 4 Russ 292 at 297; *Re Maxton* (1858) 4 Jur NS 407. As to the persons entitled on an intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq. In a gift of a mixed fund of realty and personalty, 'family' might formerly be used to denote persons entitled by legal succession according to the nature of the property, and to mean the heir as regards the real estate and the next of kin as regards the personal estate: *White v Briggs* (1848) 2 Ph 583. As to the present use of the word 'heir' see PARA 628 note 1 ante.

5 *Blackwell v Bull* (1836) 1 Keen 176 at 181 per Lord Langdale MR; *Sinnott v Walsh* (1880) 5 LR Ir 27 at 41, Ir CA. 'Family' is 'a word of most loose and flexible description': *Green v Marsden* (1853) 1 Drew 646 at 651 per Kindersley V-C. See also *Morton v Tewart* (1842) 2 Y & C Ch Cas 67 at 81.

6 See *Blackwell v Bull* (1836) 1 Keen 176; *Pigg v Clarke* (1876) 3 ChD 672 at 674 per Jessel MR.

7 *Blackwell v Bull* (1836) 1 Keen 176; *Re Drew, Drew v Drew* [1899] 1 Ch 336 at 342. See also *MacLeroth v Bacon* (1799) 5 Ves 159 (husband there included, although not so as a general rule); *James v Lord Wynford* (1854) 2 Sm & G 350.

8 *Cruwys v Colman* (1804) 9 Ves 319. See also note 10 infra.

9 *Lucas v Goldsmid* (1861) 29 Beav 657 at 660 per Romilly MR. See also *Re Macleay* (1875) LR 20 Eq 186 at 187.

10 *Grant v Lynam* (1828) 4 Russ 292; *Snow v Teed* (1870) LR 9 Eq 622 (in power of appointment). See also *Re Keighley, Keighley v Keighley* [1919] 2 Ch 388 (appointment among 'my people'). A disposition in favour of an illegitimate descendant was held valid in *Lambe v Eames* (1871) 6 Ch App 597; but see now para 643 post. If the donee does not exercise the power, in a gift to the family in default of appointment, 'family' is construed to mean next of kin: *Grant v Lynam* supra at 297.

11 *Re Barlow's Will Trusts* [1979] 1 All ER 296, [1979] 1 WLR 278.

12 *Williams v Williams* (1851) 1 Sim NS 358 at 371. See also *Doe d King v Frost* (1820) 3 B & Ald 546 (to 'younger branches of the family'). Cf *Doe d Smith v Fleming* (1835) 2 Cr M & R 638 (where a similar gift was in the circumstances void for uncertainty); *Armstrong v Armstrong* (1888) 21 LR Ir 114, Ir CA.

13 *Chapman's Case* (1574) 3 Dyer 333b (where 'to remain to the house' was construed to mean 'family', and 'family' meant the 'chief and most worthy and eldest person of the family'; recognised as binding in *Counden v Clerke* (1612) Hob 29 at 33 and in *Crossly v Clare* (1761) Amb 397); *Wright v Atkyns* (1810) 17 Ves 255 at 262 (on appeal (1814) Coop G 111 at 122; revsd, however, on the words of the will (1823) Turn & R 143 at 145, 155, HL); *Doe d Chattaway v Smith* (1816) 5 M & S 126; *Griffiths v Evan* (1842) 5 Beav 241. As to the use of 'family' as a word of limitation see PARA 668 note 11 post.

14 *Gregory v Smith* (1852) 9 Hare 708; *Charitable Donations and Bequests Comrs v Deey* (1891) 27 LR Ir 289.

15 As to the admissibility of such evidence see PARAS 483, 506-507 ante.

16 *Harland v Trigg* (1782) 1 Bro CC 142; *Doe d Hayter v Joinville* (1802) 3 East 172; *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381 at 395; *Re Cullimore's Trusts* (1891) 27 LR Ir 18. See also *Robinson v Waddelow* (1836) 8 Sim 134 (where a gift to daughters 'and their husbands and families' was rejected); but see *Re Parkinson's Trust, ex p Thompson* (1851) 1 Sim NS 242 at 245-246.

17 *Re Coates, Ramsden v Coates* [1955] Ch 495, [1955] 1 All ER 26; *Re Gibbard, Public Trustee v Davis* [1966] 1 All ER 273, [1967] 1 WLR 42; *Re Barlow's Will Trusts* [1979] 1 All ER 296, [1979] 1 WLR 278. For cases where 'friends and relations' has been read as 'relations' see PARA 637 note 1 post.

18 *Re Barlow's Will Trusts* [1979] 1 All ER 296, [1979] 1 WLR 278.

19 *Re Ball, Hand v Ball* [1947] Ch 228, [1947] 1 All ER 458 (where there was a gift to the son 'or his dependants equally', and the son took absolutely); doubted in *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 at 21, [1972] 2 All ER 1304 at 1311, CA, per Sachs LJ. Cf *Re Sayer, MacGregor v Sayer* [1957] Ch 423, [1956] 3 All ER 600; *Re Saxone Shoe Co Ltd's Trust Deed, Re Abbott's Will Trusts, Abbott v Pearson* [1962] 2 All ER 904, [1962] 1 WLR 943; *Re Baden's Deed Trusts (No 2)* supra (cases where 'dependants' was held not so uncertain in meaning as to invalidate provisions in company trust deeds for the benefit of employees, where there was a power of selection). Cf *Re Leek, Darwen v Leek* [1969] 1 Ch 563, [1968] 1 All ER 793, CA (where, if it had not

been necessary to ascertain the whole class, the court would have held that a gift to persons who, in the trustees' opinion, had moral claims on a certain person was certain).

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637. Relations.

In its primary sense 'relations'¹ extends to relations of every degree of relationship², however remote; and, where donees are thus described, this effect is given to the word wherever possible, as for example where the gift is a power of selection and appointment among relations³, or is to poor relations by way of perpetual charity⁴. In general, however, this meaning cannot be given to the word in a direct gift to relations, or in a gift to them under a power of distribution, on account of the uncertainty⁵ in the number of persons designated⁶. In such a case, therefore, the court formerly presumed that the testator intended his next of kin according to the Statutes of Distribution⁷, and there is the like presumption now in favour of the persons, other than husband or wife, entitled on intestacy⁸.

A gift to 'nearest relations' is confined to those next in blood⁹. This is so even where a charitable intention is shown¹⁰.

The class of relations is as a rule ascertained as if they were described as next of kin¹¹, and prima facie they take per capita¹² and as joint tenants¹³.

1 In *Gower v Mainwaring* (1750) 2 Ves Sen 87 ('friends and relations'), and in *Re Caplin's Will* (1865) 2 Drew & Sm 527 ('relations or friends'), 'friends' was treated as synonymous with relations, because of the uncertainty of any other construction. See also *Crichton v Grierson* (1828) 3 Bli NS 424, HL, where the same assumption was made; *Coogan v Hayden* (1879) 4 LR Ir 585, where the heir was held entitled (citing *Hensloe's Case* (1600) 9 Co Rep 36b at 39b). Cf *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, [1972] 2 All ER 1304, where 'relations' was held certain in meaning in a company trust deed for the benefit of employees with a power of selection.

2 'Kin' has a similar meaning: see *Re Chapman, Ellick v Cox* (1883) 49 LT 673 at 674 (where 'next male kin' meant next of kin who were males).

3 *Re Poulton's Will Trusts, Smail v Litchfield* [1987] 1 All ER 1068, [1987] 1 WLR 795 (daughter of testatrix empowered to divide estate among her own 'relatives' at her discretion); *Supple v Lowson* (1773) Amb 729.

4 See CHARITIES vol 8 (2010) PARA 19.

5 As to uncertainty see PARAS 554-558 ante.

6 *Brandon v Brandon* (1819) 3 Swan 312 at 319.

7 *Thomas v Hole* (1728) Cas temp Talb 251; *Whithorne v Harris* (1754) 2 Ves Sen 527; *Green v Howard* (1779) 1 Bro CC 31; *Rayner v Mowbray* (1791) 3 Bro CC 234 (persons 'who shall appear to be related to me'); *Masters v Hooper* (1793) 4 Bro CC 207; *Devisme v Mellish* (1800) 5 Ves 529; *Walter v Maunde* (1815) 19 Ves 424 (real estate); *Cracklow v Norie* (1838) 7 LJ Ch 278; *Hibbert v Hibbert* (1873) LR 15 Eq 372 (where an illegitimate relative, described in another gift as if legitimate, was not included). As to the Statutes of Distribution see PARA 632 ante; and as to powers of appointment in favour of relations see POWERS vol 36(2) (Reissue) PARA 211.

8 See *Re Brigden, Chaytor v Edwin* [1938] Ch 205, [1937] 4 All ER 342 ('all my' relatives does not enlarge the class). As to the persons entitled on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq.

9 *Smith v Campbell* (1815) 19 Ves 400.

10 *Edge v Salisbury* (1749) Amb 70; *Goodinge v Goodinge* (1749) 1 Ves Sen 231.

11 See PARA 632 ante. See also *Pearce v Vincent* (1836) 2 Keen 230; *Bishop v Cappel* (1847) 1 De G & Sm 411; *Eagles v Le Breton* (1873) LR 15 Eq 148; *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v Chillingworth* [1952] Ch 30, [1951] 2 All ER 936, CA. Cf *Tiffin v Longman* (1855) 15 Beav 275.

12 *Thomas v Hole* (1728) Cas temp Talb 251; *Tiffin v Longman* (1855) 15 Beav 275; *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v Chillingworth* [1952] Ch 30, [1951] 2 All ER 936, CA. For a case of a context to the contrary see *Fielden v Ashworth* (1875) LR 20 Eq 410. As to distribution per capita see PARA 680 post.

13 *Eagles v Le Breton* (1873) LR 15 Eq 148; *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v Chillingworth* [1952] Ch 30, [1951] 2 All ER 936, CA. See also *Re Kilvert, Midland Bank Executor and Trustee Co Ltd v Kilvert* [1957] Ch 388, [1957] 2 All ER 196.

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(B) RELATIONS THROUGH ILLEGITIMACY; DISPOSITIONS MADE BEFORE 1970

638. Relations through illegitimacy generally not included in gift.

In a disposition made before 1 January 1970¹ a description of a donee by reference to relationship to the testator or other person (as in gifts to children, issue and the like) prima facie refers only to legitimate children² and their descendants, and does not include illegitimate children and their descendants³. This rule applies to all descriptions of donees, including the children⁴, nephews⁵, nieces⁶ or relations generally⁷ of the person concerned. A person born illegitimate who is subsequently legitimated by the marriage of his parents⁸ is, from the date of legitimation, entitled to take an interest under a disposition by will coming thereafter into operation⁹ in the same way as if he had been born legitimate, but he cannot do so in such a way as to necessitate severance from a dignity or title of honour of property settled with it, and can do so only in so far as any contrary intention is not expressed in the disposition¹⁰. A person born illegitimate but subsequently legitimated is not, however, legitimate for the purposes of the will of a testator who was dead before the date of legitimation¹¹.

The ordinary meaning of 'illegitimate' is adhered to¹², and relations through illegitimacy do not satisfy a description by reference to relationship¹³ unless either, from the circumstances at the date of the will¹⁴, it is impossible that any legitimate relation could satisfy it¹⁵ or there appears in the will an intention to include relations through illegitimacy¹⁶. The question of legitimacy is in all cases decided according to the law of the domicile of the person by reference to whom the relationship of the donees is described, whether the gift is a bequest of personalty¹⁷, a specific devise of real estate¹⁸ or a devise of land on trust to sell and to apply the proceeds of sale as personalty¹⁹.

1 I.e. the date of the coming into force of the Family Law Reform Act 1969 s 15 (presumption that references to relations include references to relations through illegitimacy), replaced by the Family Law Reform Act 1987 s 1 in respect of dispositions made on or after 4 April 1988: see PARAS 643-644 post. For the purposes of either Act, 'disposition' means a disposition, including an oral disposition, of real or personal property whether inter vivos or by will or codicil; and, notwithstanding any rule of law, a disposition made by will or codicil executed before the coming into force of either Act is not to be treated as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date: Family Law Reform Act 1969 s 15(8) (repealed by the Family Law Reform Act 1987 s 33(4), Sch 4, as from 4 April 1988); Family Law Reform Act 1987 s 19(7).

2 As to the rights of legitimated persons see the text and notes 8-11 infra.

3 *Cartwright v Vawdry* (1800) 5 Ves 530; *Wilkinson v Adam* (1813) 1 Ves & B 422 at 462; *Warner v Warner* (1850) 15 Jur 141; *Hill v Crook* (1873) LR 6 HL 265 at 283; *Dorin v Dorin* (1875) LR 7 HL 568; *Re Ayles' Trusts* (1875) 1 ChD 282; *Ellis v Houstoun* (1878) 10 ChD 236 at 241; *Re Eve, Edwards v Burns* [1909] 1 Ch 796 at 800. See also *Re Fish, Ingham v Rayner* [1894] 2 Ch 83, CA ('niece'; legitimate grand-niece preferred to illegitimate grand-niece, where she sufficiently answered the description); *Re Deakin, Starkey v Eyres* [1894] 3 Ch 565 (power to appoint to 'relations' of donee of power, who was illegitimate; appointments to her natural relatives held good except to a person himself illegitimate, there being nothing to enable the court to draw the inference that the testator included him among the 'relations'); *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254, CA (no exception to the rule where the testator wrongly believes the donees to be legitimate) (overruling *Re Du Bochet, Mansell v Allen* [1901] 2 Ch 441); *Re Upton, Upton v National Westminster Bank plc* [2004] EWHC 1962 (Ch), [2004] WTLR 1339 (the exclusion of illegitimate children in pre-1970 dispositions is not a breach of the Human Rights Act 1998). In *Smith v Jobson* (1888) 59 LT 397, it was held that a share given to an illegitimate daughter went over in accordance with a clause providing for the death of 'any of my children'.

4 *Swaine v Kennerley* (1813) 1 Ves & B 469; *Re Wells' Estate* (1868) LR 6 Eq 599; *Hill v Crook* (1873) LR 6 HL 265; *Dorin v Dorin* (1875) LR 7 HL 568 at 574 per Lord Hatherley; *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254, CA; *Re Hall, Hall v Hall* [1932] 1 Ch 262; *Re Dicker, Crallan v Tomlinson* [1947] Ch 248, [1947] 1 All ER 317.

5 *Re Jackson, Beattie v Murphy* [1933] Ch 237 at 241.

6 *Re Fish, Ingham v Rayner* [1894] 2 Ch 83, CA (distinguishing *Re Jackson, Beattie v Murphy* [1933] Ch 237).

7 *Re Deakin, Starkey v Eyres* [1894] 3 Ch 565 at 572; *Sydall v Castings Ltd* [1967] 1 QB 302, [1966] 3 All ER 770, CA (descendant).

8 As to legitimation by marriage see now the Legitimacy Act 1976 ss 2, 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 128.

9 As to gifts to legitimated children under the will of a testator who dies after 31 December 1975 see PARA 645 post.

10 See, as appropriate, the Legitimacy Act 1926 ss 3, 11 (repealed); the Children Act 1975 s 8(9), Sch 1 paras 12, 16 (repealed); and, with effect from 22 August 1976, the Legitimacy Act 1976 ss 5, 11(1), Sch 1 para 4. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 131. As to the legitimacy of children of voidable marriages which are annulled see the Matrimonial Causes Act 1973 s 16, Sch 1 para 12; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 325. As to the legitimacy of children of void marriages see now the Legitimacy Act 1976 s 1 (as amended); *Re Spence, Spence v Dennis* [1990] Ch 197, [1989] 2 All ER 679; affd [1990] Ch 652, [1990] 2 All ER 827, CA; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 127. As a legitimated person is in the same position for all purposes as a person born legitimate in relation to a disposition coming into operation after the date of his legitimation, a residuary bequest to a legitimated son is saved from lapse by the Wills Act 1837 s 33 (as originally enacted) (deaths before 1 January 1983: see PARA 457 ante) or, as the case may be, s 33 (as substituted) (deaths after 31 December 1982: see PARA 459 ante). As to the status of adopted children see PARA 621 ante.

11 *Re Hepworth, Rastall v Hepworth* [1936] Ch 750, [1936] 2 All ER 1159.

12 No mere conjecture, however probable, based on the testator's knowledge of or intimacy with the illegitimate persons can exclude the rule: *Hill v Crook* (1873) LR 6 HL 265 at 276; *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254, CA (overruling *Re Du Bochet, Mansell v Allen* [1901] 2 Ch 441).

13 There is, however, no rule that illegitimate children cannot in any circumstances participate with legitimate children in the benefit of a gift to children generally: *Owen v Bryant* (1852) 2 De GM & G 697. See also *Evans v Davies* (1849) 18 LJ Ch 180; *Hill v Crook* (1873) LR 6 HL 265; *Ebbern v Fowler* [1909] 1 Ch 578, CA; *Re Pearce, Alliance Insurance Co Ltd v Francis* [1914] 1 Ch 254 at 267, CA.

14 If the circumstances at the date of the will show an intention to include illegitimate children, the construction is not varied by subsequent events, such as the circumstances existing at the date of a confirmatory codicil: *Wilkinson v Adam* (1823) 12 Price 470, HL. Ambiguity as to the legitimate relations may, however, make extrinsic evidence admissible as to the family and as to the person intended: *Re Jackson, Beattie v Murphy* [1933] Ch 237.

15 See the text and notes 17-19 infra; and PARA 640 post.

16 See PARAS 640-641 post.

17 *Re Andros, Andros v Andros* (1883) 24 ChD 637; *Re Bischoffsheim, Cassel v Grant* [1948] Ch 79, [1947] 2 All ER 830.

18 *Re Grey's Trusts, Grey v Stamford* [1892] 3 Ch 88.

19 See *Skottowe v Young* (1871) LR 11 Eq 474 (legacy duty), discussed in *Re Goodman's Trusts* (1881) 17 ChD 266, CA (disapproving *Boyce v Bedale* (1863) 1 Hem & M 798, where it was held that legitimacy was decided by the law of the testator's domicile). The doctrine of conversion, whereby land held by trustees subject to a trust for sale is regarded as personal property, has been abolished, except where the trust for sale was created by the will of a testator who died before 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is, however, not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq.

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639. Effect of absence of legitimate relations.

If there were no legitimate relations answering the description in existence at the date of a will made before 1 January 1970¹, the testator must be presumed to have contemplated the relations through illegitimacy answering the description and being able to take under an immediate gift². There is, however, no such inference where, although there were no legitimate relations in existence at the date of the will, the testator may have contemplated such relations coming into existence in the future³. The impossibility of legitimate children coming into existence when a woman is past child-bearing may be sufficient to include illegitimate children in the case of an immediate gift⁴. Similarly, the incapacity of a man to beget children may enable illegitimate children to take⁵.

1 The date of the coming into force of the Family Law Reform Act 1969 s 15 (presumption that references to relations include references to relations through illegitimacy), replaced by the Family Law Reform Act 1987 s 1 in respect of dispositions made on or after 4 April 1988: see PARAS 643-644 post.

2 *Hill v Crook* (1873) LR 6 HL 265 at 282; *Dorin v Dorin* (1875) LR 7 HL 568 at 573, 575. See also *Beachcroft v Beachcroft* (1816) 1 Madd 430; *Lord Woodhouselee v Dalrymple* (1817) 2 Mer 419 (children of a deceased person); *Dilley v Matthews* (1865) 11 Jur NS 425; *Savage v Robertson* (1868) LR 7 Eq 176 (description of mother by her maiden name); *Laker v Hordern* (1876) 1 ChD 644; *Re Haseldine, Grange v Sturdy* (1886) 31 ChD 511, CA; *Re Frogley* [1905] P 137; *O'Loughlin v Bellew* [1906] 1 IR 487.

3 *Dorin v Dorin* (1875) LR 7 HL 568. See also *Dover v Alexander* (1843) 2 Hare 275; *Durrant v Friend* (1852) 5 De G & Sm 343; *Re Brown, Penrose v Manning* (1890) 63 LT 159 (approved in *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254, CA); *Re Dieppe, Millard v Dieppe* (1915) 138 LT Jo 564.

4 *Re Eve, Edwards v Burns* [1909] 1 Ch 796 (immediate gift; existing illegitimate children held entitled). Cf *Paul v Children* (1871) LR 12 Eq 16 (future gift to her child or children; existing illegitimate children not entitled); *Re Brown, Penrose v Manning* (1890) 63 LT 159 (woman 50 years of age, but her illegitimate children excluded).

5 *Re Wohlgemuth, Public Trustee v Wohlgemuth* [1949] Ch 12, [1948] 2 All ER 882 (where evidence was admitted to prove the father's incapacity at the date of the will); *Re Herwin, Herwin v Herwin* [1953] Ch 701, [1953] 2 All ER 782, CA (where fresh evidence of the father's impotence was allowed on appeal).

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IDENTIFICATION BY REFERENCE TO RELATIONSHIPS/(B) Relations through Illegitimacy;
Dispositions made before 1970/640. Indications that illegitimate persons are included.

640. Indications that illegitimate persons are included.

In a will made before 1 January 1970¹ the testator may show his intention to include illegitimate children and their descendants in a description by referring to them, or to relations of theirs, elsewhere in his will in terms showing that he treats them as legitimate², particularly where it is apparent that the testator knew of the illegitimacy and, therefore, could not be using his language in its ordinary sense³. The existence of such an intention may, however, be rebutted by a special and distinct provision for the relations through illegitimacy, or other similar indications that the testator drew a distinction between them and the legitimate relations⁴. Moreover, indications that other illegitimate persons are treated as legitimate are not enough⁵, and may even be the ground of the inference against an illegitimate person who claims to be included⁶. Where the testator uses a word in the plural (such as 'children') when to his knowledge there is only a single legitimate person who could take under the gift, an illegitimate child may be included so as to make sense of the description⁷, but the use of a plural word is not sufficient to include illegitimate persons if there are legitimate persons sufficient to satisfy the description in its ordinary sense and there are no other indications of an intention to include illegitimate persons⁸, or if, supposing them to be included, the words of the will would still remain unsatisfied⁹. It appears that there is no hard and fast rule of construction that the mere description of a person as a relation in an earlier part of a will shows that that person is included in a general description of relations in a later part of the will, but that in all such cases the context of the will and the evidence properly admissible must be considered¹⁰.

1 The date of the coming into force of the Family Law Reform Act 1969 s 15 (presumption that references to relations include references to relations through illegitimacy), replaced by the Family Law Reform Act 1987 s 1 in respect of dispositions made on or after 4 April 1988: see PARAS 643-644 post.

2 Eg where the parents are spoken of in the will as husband and wife, or the illegitimate person is mentioned as 'son', 'daughter' or 'child' of his or her natural parent, or is otherwise considered as having relations (who in the strict legal sense could not exist) in such a way as impliedly to include the illegitimate person in the description in question: *Hill v Crook* (1873) LR 6 HL 265 at 285. See also *Meredith v Farr* (1843) 2 Y & C Ch Cas 525; *Worts v Cubitt* (1854) 19 Beav 421; *Clifton v Goodbun* (1868) LR 6 Eq 278; *Holt v Sindrey* (1868) LR 7 Eq 170 (as explained in *Re Pearce, Alliance Assurance Co Ltd v Francis* [1913] 2 Ch 674 at 687; affd [1914] 1 Ch 254, CA); *Savage v Robertson* (1868) LR 7 Eq 176; *Lepine v Bean* (1870) LR 10 Eq 160; *Re Humphries, Smith v Millidge* (1883) 24 ChD 691; *Re Bryon, Drummond v Leigh* (1885) 30 ChD 110; *Re Horner, Eagleton v Horner* (1887) 37 ChD 695; *Re Hastie's Trusts* (1887) 35 ChD 728; *Seale-Hayne v Jodrell* [1891] AC 304, HL (where illegitimate persons previously described as 'cousins' were entitled to take under a gift to 'relatives hereinbefore named'); *Re Harrison, Harrison v Higson* [1894] 1 Ch 561; *Re Walker, Walker v Lutyens* [1897] 2 Ch 238; *Re Plant, Griffith v Hill* (1898) 47 WR 183; *Re Wood, Wood v Wood* [1902] 2 Ch 542, CA; *Re Smilter, Bedford v Hughes* [1903] 1 Ch 198; *Re Kiddle, Gent v Kiddle* (1905) 92 LT 724; *Re Corsellis, Freeborn v Napper* [1906] 2 Ch 316; *Re Helliwell, Pickles v Helliwell* [1916] 2 Ch 580 (where nephews and nieces and their children were held to include legitimate descendants of the testator's natural sister); *Re B, O v D* [1916] 1 IR 364 (where 'children' was held to include an illegitimate child described as 'my daughter' elsewhere in the will); *Re Bleckley, Sidebotham v Bleckley* [1920] 1 Ch 450 at 460-461, CA.

Such indications were not considered conclusive in *Bagley v Mollard* (1830) 1 Russ & M 581; *Megson v Hindle* (1880) 15 ChD 198, CA (where there were other indications: see the text and note 4 infra); *Re Humphries, Smith v Millidge* (1883) 24 ChD 691 at 696 per North J (where a reference to 'shares' of daughters was meaningless unless the illegitimate child took); *Re Hall, Branston v Weightman* (1887) 35 ChD 551 (where the description as 'nephew' was not sufficient to include the person in a gift to the testator's sister's children). As to these cases see *Re Parker, Parker v Osborne* [1897] 2 Ch 208 at 211 et seq; *Re Walker, Walker v Lutyens* [1897] 2 Ch 238 at 242. See also *Re Dicker* [1947] Ch 248, [1947] 1 All ER 317 (where a reference to 'my nephew' in one clause did not entitle him to take as 'child' in another clause), following *Re Hall, Branston v Weightman* supra.

3 As to the importance of showing what knowledge the testator had of the facts giving rise to the illegitimacy see *Re Herbert's Trusts* (1860) 1 John & H 121 at 124; *Hill v Crook* (1873) LR 6 HL 265 at 277, 283; *Re Horner, Eagleton v Horner* (1887) 37 ChD 695 at 707 (commenting on *Re Ayles' Trusts* (1875) 1 ChD 282); *Re Cullum, Mercer v Flood* [1924] 1 Ch 540 ('right heirs'; no evidence that testatrix knew of her illegitimacy); *Re Taylor, Hockley v O'Neal* [1925] Ch 739 (ignorance of illegitimacy). The testator's knowledge of the illegitimacy

is not material where his words make sense in their ordinary meaning; see *Godfrey v Davis* (1801) 6 Ves 43 at 48; *Warner v Warner* (1850) 15 Jur 141 at 142 per Knight Bruce V-C. The testator's ignorance of the illegitimacy and his belief that the parents of the illegitimate person were married may negative the inference that that person was intended to take: *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254 at 263, CA. A gift by an unmarried person to his or her own children takes effect (apart from the question of revival after marriage) in favour of illegitimate children: *Clifton v Goodbun* (1868) LR 6 Eq 278. As to the revocation of a will by marriage see PARA 379 ante; and as to revival see PARAS 402-403 ante.

4 *Megson v Hindle* (1880) 15 ChD 198, CA; *Re Hall, Branston v Weightman* (1887) 35 ChD 551 at 557.

5 *Mortimer v West* (1827) 3 Russ 370; *Re Well's Estate* (1868) LR 6 Eq 599; *Re Warden, Midland Bank Executor and Trustee Co Ltd v Warden* (1962) Times, 12 December (cases of particular children being mentioned and treated as 'children'; no inference in favour of illegitimate child not expressly mentioned).

6 *Kelly v Hammond* (1858) 26 Beav 36.

7 *Gill v Shelley* (1831) 2 Russ & M 336; *Leigh v Byron* (1853) 1 Sm & G 486; *Tugwell v Scott* (1857) 24 Beav 141; *Re Embury, Bowyer v Page (No 2)* [1914] WN 220.

8 *Edmunds v Fessey* (1861) 29 Beav 233.

9 *Hart v Durand* (1796) 3 Anst 684. The fact that the property is divided by the testator into a number of shares corresponding with the whole number of legitimate or illegitimate claimants was considered not a sufficient indication in *Cartwright v Vawdry* (1800) 5 Ves 530; *Re Wells' Estate* (1868) LR 6 Eq 599.

10 *Re Cozens, Miles v Wilson* [1903] 1 Ch 138 at 142-143 (following *Re Jodrell, Jodrell v Searle* (1890) 44 ChD 590, CA; affd sub nom *Seale-Hayne v Jodrell* [1891] AC 304, HL).

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641. Gifts to illegitimate children of a named person.

Where a gift in a will made before 1 January 1970¹ is to the children of a named person², or the children of a named man by a certain woman³, and is such that in the circumstances existing illegitimate children are denoted, the gift is construed as referring to those who at the date of the will have acquired the reputation⁴ of being the named person's children.

1 The date of the coming into force of the Family Law Reform Act 1969 s 15 (presumption that references to relations include references to relations through illegitimacy), replaced by the Family Law Reform Act 1987 s 1 in respect of dispositions made on or after 4 April 1988: see PARAS 643-644 post.

2 *Laker v Hordern* (1876) 1 ChD 644 at 650.

3 *Wilkinson v Adam* (1813) 1 Ves & B 422; affd (1823) 12 Price 470, HL. This case has been considered to go to the extreme verge of the law: see *Warner v Warner* (1850) 15 Jur 141 at 142.

4 For the meaning of 'reputation' for this purpose see PARA 642 note 10 post.

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642. Future illegitimate children.

Although, in a will made before 1 January 1970¹, a gift to a sufficiently designated illegitimate child who was alive² or *en ventre sa mère*³ at the date of the will, or is alive⁴ or *en ventre sa mère*⁵ at the date of the testator's death, is valid⁶, it was before that date a rule of law grounded on public policy that gifts could not be made by will to illegitimate children not born or begotten at the testator's death by a description expressly or impliedly referring to them as such⁷. The fact that all the intended donees, including those excluded by this rule, were to take as a class does not prevent the gift from taking effect in favour of those who are not excluded⁸.

Further, in a will made before 1 January 1970, there cannot be a valid gift to an illegitimate child not alive at the date of the will, and described only by reference to the fact of its paternity, as the law does not in such a case permit an inquiry as to paternity⁹. Where, however, the child is described expressly or impliedly by reference to the reputation of its paternity (as in the case of a gift to the children whom a particular woman is reputed to have by a particular man), the gift is valid so long as the child in question has acquired the reputation¹⁰ of that paternity at the testator's death¹¹. In the case of a gift to the future illegitimate children of a woman, without further description, there is no difficulty of proof but the gift is subject to the rule that only children born or begotten at the testator's death may take¹².

1 le the date of the coming into force of the Family Law Reform Act 1969 s 15 (presumption that references to relations include references to relations through illegitimacy), replaced by the Family Law Reform Act 1987 s 1 in respect of dispositions made on or after 4 April 1988: see PARAS 643-644 post.

2 See *Metham v Duke of Devon* (1718) 1 P Wms 529; *Barnett v Tugwell* (1862) 31 Beav 232; *Bentley v Blizard* (1858) 4 Jur NS 652. Thus illegitimate children living at the date of the will may take under a gift to children 'legitimate or otherwise' (*Howarth v Mills* (1866) LR 2 Eq 389), or to 'the children of A by her putative husband or any other person she might marry' (*Re Brown's Trust* (1873) LR 16 Eq 239). It is sufficient if the children are referred to by name: *Rivers' Case* (1737) 1 Atk 410; *Re B, O v D* [1916] 1 IR 364.

3 *Gordon v Gordon* (1816) 1 Mer 141; *Evans v Massey* (1819) 8 Price 22 (cases of express gifts to child of whom a woman was pregnant); *Occleston v Fullalove* (1874) 9 Ch App 147 (gift to children of woman which should be reputed to be testator's); *Re Loveland, Loveland v Loveland* [1906] 1 Ch 542 (gift to children of a woman living at the testator's death). Cf *Metham v Duke of Devon* (1718) 1 P Wms 529. As to the rights of a person *en ventre sa mère* generally see PARA 647 post.

4 *Occleston v Fullalove* (1874) 9 Ch App 147 (overruling on this point *Medworth v Pope* (1859) 27 Beav 71; *Howarth v Mills* (1866) LR 2 Eq 389); *Perkins v Goodwin* [1877] WN 111.

5 *Crook v Hill* (1876) 3 ChD 773. It has been said that such a child may acquire the reputation of a certain paternity: *Re Connor* (1845) 2 Jo & Lat 456 at 460 per Sugden LC; *Pratt v Mathew* (1856) 22 Beav 328 at 339 per Romilly MR. Cf *Occleston v Fullalove* (1874) 9 Ch App 147 at 153 per Lord Selborne LC, at 158 per James LJ, and at 169 per Mellish LJ; *Re Bolton, Brown v Bolton* (1886) 31 ChD 542 at 549, 553, CA, per Fry LJ (where the child was considered to be described by reference to the fact of paternity, and, therefore, could not take).

6 So long as the provision is limited to children in being when the document takes effect, it is more in accordance with the former rule of public policy that provision should be made for them than that such a provision should be beyond the scope of the law and the offspring should become a burden on public funds: see *Re Loveland, Loveland v Loveland* [1906] 1 Ch 542 at 548 per Swinfen Eady J; *O'Loughlin v Bellew* [1906] 1 IR 487 at 493.

7 *Hill v Crook* (1873) LR 6 HL 265 at 278, 280; *Crook v Hill* (1876) 3 ChD 773; *Holt v Sindrey* (1868) LR 7 Eq 170. As to the abolition of this rule in relation to dispositions of property made on or after 1 January 1970 see PARA 643 post.

8 *Holt v Sindrey* (1868), as reported in 38 LJ Ch 126; *Hill v Crook* (1873) LR 6 HL 265 at 278; *Crook v Hill* (1876) 3 ChD 773. See also *Ebborn v Fowler* [1909] 1 Ch 578, CA (settlement) (overruling *Re Shaw, Robinson v Shaw* [1894] 2 Ch 573).

9 *Re Bolton, Brown v Bolton* (1886) 31 ChD 542, CA; *Re Du Bochet, Mansell v Allen* [1901] 2 Ch 441 (overruled, but on the question of construction only, in *Re Pearce, Alliance Assurance Co Ltd v Francis* [1914] 1 Ch 254, CA); *Re Homer, Cowlshaw v Rendell* (1916) 86 LJ Ch 324. A child *en ventre sa mère* is excluded where

the description refers to the paternity: *Earle v Wilson* (1811) 17 Ves 528; *Pratt v Matthew* (1856) 22 Beav 328. See also *Re Homer*, *Cowlishaw v Rendell* (1916) 86 LJ Ch 324.

10 'Reputation' in such cases, it appears, means not that of rumour or fame spread by gossip, but that which springs from acknowledgment, conduct and life: *Occleston v Fullalove* (1874) 9 Ch App 147 at 164. A power for the donee to appoint to his reputed children is valid: *Re Hyde, Smith v Jack* [1932] 1 Ch 95.

11 *Metham v Duke of Devon* (1718) 1 P Wms 529; *Occleston v Fullalove* (1874) 9 Ch App 147. Evidence may be admitted only for the purpose of ascertaining who had acquired such reputation: *Wilkinson v Adam* (1813) 1 Ves & B 442 at 466-467 (affd (1823) 12 Price 470, HL); *Swaine v Kennerley* (1813) 1 Ves & B 469.

12 *Re Hastie's Trusts* (1887) 35 ChD 728; *Re Loveland, Loveland v Loveland* [1906] 1 Ch 542.

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(C) RELATIONS THROUGH ILLEGITIMACY; DISPOSITIONS MADE AFTER 31 DECEMBER 1969 AND BEFORE 4 APRIL 1988

643. Presumption in favour of illegitimate children and descendants.

In any disposition¹ made² between 1 January 1970 and 3 April 1988 inclusive, any reference (whether express or implied) to the child or children of any person is, unless the contrary intention appears, to be construed as, or as including, a reference to any illegitimate child of that person³; and any reference (whether express or implied) to a person or persons related in some other manner to any person is, unless the contrary intention appears, to be construed as, or as including, a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate⁴. These provisions apply only where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related⁵; but they do not affect the construction of the word 'heir' or 'heirs' or of any expression which is used to create an entailed interest⁶ in real or personal property⁷.

Any rule of law that a disposition in favour of illegitimate children not in being when the disposition takes effect is void as contrary to public policy⁸ is abolished as respects dispositions made on or after 1 January 1970⁹.

Where under any disposition any real or personal property or any interest in such property is limited (whether subject to any preceding limitation or charge or not), in such a way that it would, apart from this provision, devolve (as nearly as the law permits) along with a dignity or title of honour, then, whether or not the disposition contains an express reference to the dignity or title of honour, and whether or not the property or some interest in the property may in some event become severed from it, nothing in the above provisions¹⁰ is to operate to sever the property or any interest in it from the dignity or title, but the property or interest is to devolve in all respects as if those provisions had not been enacted¹¹.

1 For the meaning of 'disposition' see PARA 638 note 1 ante.

2 For these purposes, a disposition by will or codicil is 'made' when the will or codicil is executed; and, notwithstanding any rule of law, a disposition made by will or codicil executed before 1 January 1970 is not treated as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed

on or after that date: Family Law Reform Act 1969 s 15(8) (repealed). Section 15 is repealed by the Family Law Reform Act 1987 s 25(2), Sch 4, in relation to dispositions made on or after 4 April 1988.

3 Family Law Reform Act 1969 s 15(1)(a) (repealed); Family Law Reform Act 1969 (Commencement No 1) Order 1969, SI 1969/1140, art 2.

4 Family Law Reform Act 1969 s 15(1)(b) (repealed). As to the statutory protection of trustees and personal representatives see s 17 (repealed); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 590.

5 Family Law Reform Act 1969 s 15(2) (repealed). Thus s 15(1) (repealed) has no application eg to a gift 'to A but, if he predeceases me without leaving issue, then to B'; the gift to B takes effect even if A left illegitimate issue.

6 Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

7 Family Law Reform Act 1969 s 15(2) (repealed).

8 As to the former rule of law see PARA 642 ante.

9 Family Law Reform Act 1969 s 15(7) (repealed).

10 *le* *ibid* s 15 (repealed): see the text and notes 1-9 *supra*.

11 *Ibid* s 15(5) (repealed).

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(D) RELATIONS THROUGH ILLEGITIMACY; DISPOSITIONS MADE ON OR AFTER 4 APRIL 1988

644. Presumption in favour of illegitimate children and descendants.

In dispositions, whether of real or personal property, by will or codicil where the will or codicil is made¹ on or after 4 April 1988, references (whether express or implied) to any relationship between two persons are to be construed, unless the contrary intention appears, without regard to whether or not the father and mother of either of them, or the father or mother of any person through whom the relationship is deduced, have or had been married to each other at any time². The use, without more, of the word 'heir' or 'heirs' or any expression purporting to create an entailed interest³ in real or personal property does not show a contrary intention⁴.

Where under any such disposition of real or personal property by will or codicil, any interest in such property is limited (whether subject to any preceding limitation or charge or not) in such a way that it would, apart from these provisions⁵, devolve (as nearly as the law permits) along with a dignity or title of honour, then, whether or not the disposition contains an express reference to the dignity or title of honour, and whether or not the property or some interest in the property may in some event become severed from it, nothing in the above provisions⁶ is to operate to sever the property or any interest in it from the dignity or title, but the property or interest is to devolve in all respects as if those provisions had not been enacted⁷.

1 Notwithstanding any rule of law, a disposition made by will or codicil executed before 4 April 1988 is not treated as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date: Family Law Reform Act 1987 s 19(7).

2 Ibid ss 1(1), 19(1), (6). Nothing restricts these provisions to cases where the reference in question is a reference to a person who is to benefit or who is to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related, as is the case with the Family Law Reform Act 1969 s 15 (repealed) (see PARA 643 ante). The Family Law Reform Act 1987 s 19 (as amended) is without prejudice to the Adoption Act 1976 s 42 (construction of dispositions in cases of adoption: see PARA 645 post): Family Law Reform Act 1987 s 19(5). As from a day to be appointed, s 19 (as amended) is to be without prejudice to the Adoption and Children Act 2002 s 69 (not yet in force). At the date at which this volume states the law, no such day had been appointed.

3 Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

4 Family Law Reform Act 1987 s 19(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 25).

5 I.e. the Family Law Reform Act 1987 s 19 (as amended): see the text and notes 1-4 supra.

6 See note 5 supra.

7 Family Law Reform Act 1987 s 19(4), (6).

UPDATE

644 Presumption in favour of illegitimate children and descendants

NOTE 2--2002 Act s 69 now in force: SI 2005/2213.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/A. IDENTIFICATION BY REFERENCE TO RELATIONSHIPS/(E) Adopted and Legitimated Children; Testator dying after 1975/645. Dispositions in favour of adopted or legitimated children.

(E) ADOPTED AND LEGITIMATED CHILDREN; TESTATOR DYING AFTER 1975

645. Dispositions in favour of adopted or legitimated children.

As from 1 January 1976 or the date of adoption¹, if later, an adopted child is to be treated in law, where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnised) and, in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter)², and not the child of any other person³. This is, however, without prejudice to any interest vested in possession in the adopted child before the adoption, or any interest expectant (whether immediately or not) on an interest so vested⁴. Subject to any contrary indication, any disposition⁵ of property contained in the will of a testator who dies on or after 1 January 1976 is to be construed accordingly⁶. Where a disposition contained in such a will depends on the date of birth of a child or children of the adoptive⁷ parent or parents, the disposition is to be construed as if the adopted child had been born on the date of adoption, and two or more children adopted on the same date had been born on that date in order of their actual births, but this does not affect any reference to a child's age⁸.

Dispositions contained in the will of a testator who dies on or after 1 January 1976 are to be construed on the footing that a legitimated person⁹, and any other person, is entitled to take

any interest under the will as if he had been born legitimate¹⁰. A disposition which depends on the date of birth of a child or children of the parent or parents is to be construed as if a legitimated child had been born on the date of legitimation, and two or more children legitimated on the same date had been born on that date in the order of their actual births, but this does not affect any reference to a child's age¹¹.

If an illegitimate person, or a person adopted by one of his natural parents, dies (at any time) and:

- 69 (1) his parents subsequently marry; and
- 70 (2) the deceased would, if living at the time of the marriage, have become a legitimated person,

the will is to be construed, so far as it relates to the taking of interests by, or in succession to, his spouse, children and remoter issue, as if he had been legitimated by virtue of the marriage¹².

Where a disposition depends on the date of birth of a child who was born illegitimate and who either is adopted by one of the natural parents as sole adoptive parent, or is legitimated (or, if deceased, is treated as legitimated), the above provisions as to the construction of dispositions depending on the date of birth¹³ do not affect his rights under the Family Law Reform Act 1969¹⁴. Where a disposition depends on the date of birth of an adopted child who is legitimated (or, if deceased, is treated as legitimated), the provisions relating to the dates of birth of legitimated persons¹⁵ does not affect his entitlement under the similar provisions relating to adoption¹⁶.

None of the above provisions affects the devolution of any property limited (expressly or not) to devolve (as nearly as the law permits) along with any peerage or dignity or title of honour; but this provision applies only if and so far as a contrary intention is not expressed in the will, and has effect subject to the terms of the will¹⁷.

1 For the meaning of 'adoption' see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 375.

2 Adoption Act 1976 s 39(1), (5). The Adoption Act 1976 s 73(3), Sch 4 repealed the Children Act 1975 Sch 1 paras 1-11, 14-17, and these provisions were replaced by the Adoption Act 1976 Pt IV (ss 38-49) (as amended), which was brought into force on 1 January 1988 (see the Children Act 1975 and the Adoption Act 1976 (Commencement No 2) Order 1987, SI 1987/1242, art 2(2), Sch 2). As from a day to be appointed, the Adoption Act 1976 s 39 (as amended) is to be replaced by the Adoption and Children Act 2002 s 67 (not yet in force) (status conferred by adoption) in relation to wills of testators dying on or after 1 January 1976: see the Adoption and Children Act 2002 s 73(4), Sch 4 para 17 (not yet in force). At the date at which this volume states the law, no such day had been appointed. As to adoption generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq.

3 Adoption Act 1976 s 39(2) (amended by Adoption (Intercountry Aspects) Act 1999 ss 4(2), 17). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 376. See also note 2 *supra*.

4 Adoption Act 1976 s 42(4). See also *Staffordshire County Council v B* [1999] 2 FCR 333, [1998] 1 FLR 261 (a child's contingent interest expectant upon his natural mother's life interest was an interest expectant upon an interest in possession and so was not prejudiced by the child's adoption). As from a day to be appointed, the Adoption Act 1976 s 42 is to be replaced by the Adoption and Children Act 2002 s 69 (not yet in force) in relation to wills of testators dying on or after 1 January 1976: see the Adoption and Children Act 2002 s 73(4), Sch 4 para 18 (not yet in force). At the date at which this volume states the law, no such day had been appointed. See also note 2 *supra*.

5 For the meaning of 'disposition' see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 379.

6 See the Adoption Act 1976 ss 39(6), 42(1), 46(3). See also notes 2, 4 *supra*.

7 For the meaning of 'adoptive parent' see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 394.

8 Adoption Act 1976 s 42(2). See note 4 supra. Examples of phrases in wills on which this provision can operate are: (1) children of A 'living at my death or born afterwards'; (2) children of A 'living at my death or born afterwards before any one of such children for the time being in existence attains a vested interest and who attain the age of 21 years'; (3) as in head (1) or head (2) supra, but referring to grandchildren of A instead of children of A; (4) A for life 'until he has a child', and then to his child or children: s 42(3). Section 42(2) will not affect the reference to the age of 21 years in the example given in head (2) supra: s 42(3) note.

9 For these purposes, 'legitimated person' means a person legitimated or recognised as legitimated under the Legitimacy Act 1976 s 1 (as amended), s 2 or s 3, or under the Legitimacy Act 1926 s 1 or s 8 (repealed), or by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and Wales and effected under the law of any other country: Legitimacy Act 1976 s 10(1).

10 See *ibid* ss 5(1), (3), 10(1), (3).

11 *Ibid* s 5(4). For examples of phrases in wills on which these provisions can operate see s 5(5) (which sets out examples identical to those set out in note 8 supra).

12 *Ibid* s 5(6).

13 *Ie* the Adoption Act 1976 s 42(2) and the Legitimacy Act 1976 s 5(4).

14 Adoption Act 1976 s 43(1); Legitimacy Act 1976 s 6(1); and see note 2 supra. These provisions apply *eg* where:

- 3 (1) a testator dies in 1976 bequeathing a legacy to his eldest grandchild living at a specified time;
- 4 (2) his daughter has an illegitimate child in 1977 who is the first grandchild;
- 5 (3) his married son has a child in 1978;
- 6 (4) subsequently the illegitimate child is legitimated (or adopted by the mother as sole adoptive parent),

and in all those cases the daughter's child remains the eldest grandchild of the testator throughout: Adoption Act 1976 s 43(2); Legitimacy Act 1976 s 6(3). As to the rights of an illegitimate child with regard to dispositions by will on and after 1 January 1970 see *PARA* 643 *ante*. As from a day to be appointed, the Adoption Act 1976 s 43 is to be replaced by the Adoption and Children Act 2002 s 70, Sch 4 para 18 (not yet in force). At the date at which this volume states the law, no such day had been appointed.

15 *Ie* the Legitimacy Act 1976 s 5(4).

16 *Ibid* s 6(2).

17 Adoption Act 1976 s 44(2), (3); Legitimacy Act 1976 s 11, Sch 1 para 4(3); and see note 2 supra. As from a day to be appointed, the Adoption Act 1976 s 44(2) is to be replaced by the Adoption and Children Act 2002 s 71(2) (not yet in force). At the date at which this volume states the law, no such day had been appointed.

UPDATE

645 Dispositions in favour of adopted or legitimated children

NOTES--2002 Act ss 43, 67, 69 now in force: SI 2005/2213; and s 73(4), Sch 4 paras 17, 18 now in force: SI 2005/2897.

NOTE 9--Definition of 'legitimated person' amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 19.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/A. IDENTIFICATION BY REFERENCE TO RELATIONSHIPS/(F) Artificial Insemination and In Vitro Fertilisation/646. Children born as a result of artificial insemination or in vitro fertilisation.

(F) ARTIFICIAL INSEMINATION AND IN VITRO FERTILISATION

646. Children born as a result of artificial insemination or in vitro fertilisation.

Where a child is born on or after 4 April 1988¹ in England and Wales as a result of the artificial insemination (which took place before 1 August 1991²) of a woman who was at the time of the insemination a party to a marriage³, being a marriage which had not at that time been dissolved or annulled, and was artificially inseminated with the semen of some person other than the other party to that marriage, then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child is to be treated in law as the child of the parties to that marriage and is not to be treated as the child of any person other than the parties to that marriage⁴. Nothing in these provisions⁵ affects the succession to any dignity or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title⁶.

Provision is made by the Human Fertilisation and Embryology Act 1990⁷ in relation to who is to be regarded as the mother and father of a child carried by a woman as a result of the placing in her of embryos or of sperm and eggs, or of her artificial insemination, as the case may be, on or after 1 August 1991⁸.

The woman who is carrying or has carried⁹ a child as a result of the placing in her of an embryo¹⁰ or of sperm and eggs¹¹, whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs, and no other woman, is to be treated as the mother of the child¹², unless that child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters¹³.

Where a child is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial fertilisation, if, at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination, as the case may be¹⁴. If no man is so treated¹⁵ as the father of the child but the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services¹⁶ provided for her and a man together by a person to whom a licence applies¹⁷, whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or of her artificial fertilisation, and the creation of the embryo carried by her was not brought about with the sperm of that man, that man is to be treated as the father of the child¹⁸.

Where the sperm of a man who had given consent for the use of gametes for treatment of others¹⁹ was used for such a purpose, or the sperm of a man or any embryo the creation of which was brought about with his sperm was used after his death, he is not to be treated as the father of the child²⁰.

Where by virtue of the provisions described above²¹ a person is to be treated as the mother or father of a child, that person is to be treated in law as the mother or, as the case may be, father of the child for all purposes²², and, where a person is not to be treated as the mother or father of a child, that person is to be treated in law as not being the mother or, as the case may be, father of the child for any purpose²³, so that references to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly²⁴. Nothing in these provisions²⁵ affects the succession to any dignity

or title of honour or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title, or the devolution of any property limited (expressly or not) to devolve (as nearly as the law permits) along with any dignity or title of honour²⁶.

1 Ie the date on which the Family Law Reform Act 1987 s 27 was brought into force: see s 34(2); and the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425, art 2, Schedule.

2 Ie the date on which the Human Fertilisation and Embryology Act 1990 ss 27-29 (see the text and notes 9-26 *infra*) were brought into force: see s 49(2); and the Human Fertilisation and Embryology Act 1990 (Commencement No 3 and Transitional Provisions) Order 1991, SI 1991/1400, art 2(2).

3 For these purposes, 'marriage' includes a reference to a void marriage if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid, and it is to be presumed, unless the contrary is shown, that one of the parties so believed at that time that the marriage was valid: Family Law Reform Act 1987 s 27(2).

4 Ibid s 27(1); Human Fertilisation and Embryology Act 1990 s 49(4).

5 Ie the Family Law Reform Act 1987 s 27: see the text and notes 1-4 *supra*.

6 Ibid s 27(3).

7 Ie by the Human Fertilisation and Embryology Act 1990 ss 27-29 (as amended): see *infra*.

8 Ibid s 49(3).

9 For these purposes, a woman is not to be treated as carrying a child until the embryo has become implanted: *ibid* s 2(3). For the meaning of 'embryo' see note 10 *infra*.

10 For these purposes, 'embryo' means a live human embryo where fertilisation is complete (ie on the appearance of a two-cell zygote); and references to an embryo include an egg in the process of fertilisation: *ibid* s 1(1).

11 For these purposes, references to gametes, eggs or sperm are references to live human gametes, eggs or sperm except where otherwise stated; but references to gametes or eggs do not include eggs in the process of fertilisation: *ibid* s 1(4).

12 Ibid s 27(1), (3).

13 Ibid s 27(2). As from a day to be appointed, s 27(2) is amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 76, 77 so as to provide that the Human Fertilisation and Embryology Act 1990 s 27(1) is not to apply if the child is treated by virtue of adoption as not being the woman's child. At the date at which this volume states the law, no such day had been appointed.

14 Ibid s 28(1), (2), (8). For these purposes, the references to the parties to a marriage at the time referred to in s 28(2) are references to the parties to a marriage subsisting at that time, unless a judicial separation was then in force, but includes the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid, and it is presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid: s 28(7). 'Judicial separation' includes a legal separation obtained in a country outside the British Islands and recognised in the United Kingdom: s 28(9). For the meaning of 'the British Islands' see STATUTES vol 44(1) (Reissue) PARA 1383. Section 28(2) does not apply to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to the marriage, or to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters: s 28(5)(a), (c). Where s 28(2) applies, no other person is to be treated as the father of the child: s 28(4). As from a day to be appointed, s 28(5)(c) is amended by the Adoption and Children Act 2002 s 139(1), Sch 3 paras 76, 78 so as to provide that the Human Fertilisation and Embryology Act 1990 s 28(2), (3) is not to apply if the child is treated by virtue of adoption as not being the man's child. At the date at which this volume states the law no such day had been appointed.

15 Ie by virtue of *ibid* s 28(2): see the text and note 14 *supra*.

16 For these purposes, 'treatment services' means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children: *ibid* s 2(1).

17 For meaning of references to the persons to whom a licence applies see *ibid* s 17(2); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 286.

18 Ibid s 28(3), (8). Section 28(3) does not apply to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to the marriage, or to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters: s 28(5) (a), (c) (prospectively amended: see note 14 *supra*). Where s 28(3) applies, no other person is to be treated as the father of the child: s 28(4).

19 Ie such consent as is required by *ibid* Sch 3 para 5: see *MEDICAL PROFESSIONS* vol 30(1) (Reissue) PARA 285.

20 Ibid s 28(6). This is subject to s 28(5A), (5B) (as added): s 28(6) (amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 s 2(1), Schedule para 14).

21 Ie the Human Fertilisation and Embryology Act 1990 ss 27, 28 (as amended): see the text and notes 9-20 *supra*.

22 Ibid s 29(1).

23 Ibid s 29(2).

24 Ibid s 29(3). Thus these provisions, unusually, have retrospective force.

25 Ie *ibid* s 27(1) or s 28(2)-(4), read with s 29 (as amended).

26 Ibid s 29(4).

UPDATE

646 Children born as a result of artificial insemination or in vitro fertilisation

TEXT AND NOTES 9-26--Human Fertilisation and Embryology Act 1990 ss 27-29 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479): Human Fertilisation and Embryology Act 2008 s 57(2). See *CHILDREN AND YOUNG PERSONS*.

NOTE 11--For the purposes of the 1990 Act, sperm is to be treated as partner-donated sperm if the donor of the sperm and the recipient of the sperm declare that they have an intimate physical relationship: s 1(5) (added by the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007, SI 2007/1522, reg 4).

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(G) RIGHTS OF A PERSON EN VENTRE SA MÈRE

647. Circumstances in which person not yet born is treated as born.

Words referring to children or issue 'born' before or 'living' at or 'surviving' a particular point of time or event do not in their ordinary or natural meaning include a child en ventre sa mère at the relevant date¹. It has, however, been adopted as a rule of construction² for giving effect to a presumed intention³ that, in a gift or condition referring to persons of named relationship who are born at or living at a particular time⁴, the description includes a person who is then en ventre sa mère and is afterwards born alive, and would have come under the description if he had been then actually born or living, provided that this construction is for the benefit of the

unborn person⁵, and, it seems, provided that there is no context in the will negating the presumed intention⁶. The rule is commonly stated with respect to gifts to children⁷; but it also applies to other descriptions of relatives⁸, and to descriptions of persons in conditions as well as in gifts⁹. In order, however, to be capable of taking under this rule, the person must be capable of having been begotten, and in dispositions made before 1 January 1970¹⁰, legitimately begotten, before the period of distribution¹¹. The rule has been applied in relation to an interest appointed in exercise of a power¹².

The proviso that the rule is applied only where it is for the benefit of the unborn child is subject to an exception in certain cases where there is a question of applying the rule against perpetuities¹³. Moreover, for the purpose of the rule by which a devise of real estate to a person and his children was, before 1 January 1926, construed as giving him an estate tail if he had no child in existence at the death of the testator¹⁴, a child en ventre sa mère was not, it seems, regarded as in existence¹⁵.

1 See *Elliott v Lord Joicey* [1935] AC 209 at 233, HL.

2 Apart from the construction of a will, a child en ventre sa mère is treated as born for certain other purposes, eg for the purpose of taking under the former Statutes of Distribution (see PARA 632 ante) or the legislation now governing succession on intestacy (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 667). As to the capacity of a person en ventre sa mère to take by devise see PARA 347 ante; and as to his capacity for being a life in being for the purpose of the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1011, 1013. In *Re Watson, Culme-Seymour v Brand* [1930] 2 Ch 344, 'within due time after my death' was held to refer to the period of gestation. As to this period see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 94. In the Administration of Estates Act 1925, references to a child or issue living at the death of any person include a child or issue en ventre sa mère at the death: s 55(2).

3 *Clarke v Blake* (1788) 2 Bro CC 319 at 320 per Lord Thurlow LC; *Trower v Butts* (1823) 1 Sim & St 181 at 184 per Leach V-C. The only justification for such a fictional construction is that, where a person makes a gift to a class of children or issue described as 'born' before or 'living' at or 'surviving' a particular point of time or event, a child en ventre sa mère at the time must necessarily be within the reason and motive of the gift: *Elliott v Lord Joicey* [1935] AC 209 at 233-234, HL, per Lord Russell of Killowen. This construction is not confined to class gifts: *Re Stern's Will Trusts, Bartlett v Stern* [1962] Ch 732 at 735, [1961] 3 All ER 1129 at 1132. In *Doe d Clarke v Clarke* (1795) 2 Hy Bl 399, Eyre CJ said that independently of intention a child en ventre sa mère was 'living', and this view was followed in *Re Burrows, Cleghorn v Burrows* [1895] 2 Ch 497, but it can no longer be supported in view of *Elliott v Lord Joicey* supra (where *Re Burrows, Cleghorn v Burrows* supra was overruled).

4 The qualification 'born at' or 'living at' the particular time may be expressly made by the words of the will, or impliedly made under the rules for the ascertainment of the class. Thus the rule applies where the gift is to 'children' simply, where the class is ascertained during the gestation of the unborn person: *Northey v Strange* (1716) 1 P Wms 340 at 342 (where the gift was to children and grandchildren, and a grandchild en ventre sa mère at the testator's death was held not entitled to take). Cf *Storrs v Benbow* (1833) 2 My & K 46 (revsd on appeal (1853) 3 De GM & G 390) (where the gift was 'to each child that may be born' to certain persons); *Mogg v Mogg* (1815) 1 Mer 654; *Re Hallett, Hallett v Hallett* [1892] WN 148.

5 *Villar v Sir Walter Gilbey* [1907] AC 139, HL (where the rule was not applied to a condition reducing the interest of a tenant in tail to a life estate); *Elliott v Lord Joicey* [1935] AC 209, HL (where the rule was not applied where the result would have been to benefit the parent's estate and not the child directly). See also *Trower v Butts* (1823) 1 Sim & St 181; *Blasson v Blasson* (1864) 2 De GJ & Sm 665 (where the words in question were used for the purpose only of ascertaining a period of time); *Pearce v Carrington* (1873) 8 Ch App 969 (where the benefit was that the divesting of the unborn person's interest under another clause was prevented). In *Blasson v Blasson* supra at 670, Lord Westbury LC said that the rule applied only for the purpose of enabling the unborn child to take a benefit to which, if born, the child would be entitled.

6 It seems that the context of the will, as applied to the circumstances, may show that by the description in the will the testator meant to describe persons actually known to him (see *Millar v Turner* (1748) 1 Ves Sen 85 at 86 per Lord Hardwicke LC), or that he had no thought of the child en ventre sa mère as an immediate recipient of his bounty (see *Roper v Roper* (1867) LR 3 CP 32 at 35; *Re Emery's Estate, Jones v Emery* (1876) 3 ChD 300; and PARA 566 note 3 ante). The early equity decisions are not easily reconcilable. According to Buller J in *Doe d Clarke v Clarke* (1795) 2 Hy Bl 399 at 401, there were two classes of cases: the first, where the gift was in the nature of a portion or provision for children, and there an afterborn child took his share with the rest (see *Millar v Turner* supra); the second, where the gift arose from some motives of personal affection, and there it was confined to children actually in existence (see *Cooper v Forbes* (1786) 2 Bro CC 63 (where Lord Kenyon MR, following *Ellison v Airey* (1748) 1 Ves Sen 111 and *Pierson v Garnet* (1786) 2 Bro CC 38, held that a child en

ventre sa mère could not take under a bequest to the children of A living at the testator's death)). See also *Freemantle v Freemantle* (1786) 1 Cox Eq Cas 248; *Musgrave v Parry* (1715) 2 Vern 710.

7 *Hale v Hale* (1692) Prec Ch 50; *Clarke v Blake* (1788) 2 Bro CC 319 (on appeal (1795) 2 Ves 673); *Doe d Clarke v Clarke* (1795) 2 Hy Bl 399; *Rawlins v Rawlins* (1796) 2 Cox Eq Cas 425; *Whitelock v Heddon* (1798) 1 Bos & P 243 ('to any son . . . begotten and born' at a certain time); *Trower v Butts* (1823) 1 Sim & St 181; *Re Salaman, De Pass v Sonnenthal* [1908] 1 Ch 4 at 6, 8, CA.

8 *Storrs v Benbow* (1853) 3 De GM & G 390; *Re Salaman, De Pass v Sonnenthal* [1908] 1 Ch 4, CA (great-nephews and great-nieces); *Re Hallett, Hallett v Hallett* [1892] WN 148. In *Bennett v Honywood* (1772) Amb 708 at 712, the court declined to extend the rule to a gift to 'relations by consanguinity', but the ratio decidendi, that the rule applied only to the case of a devise to children, is contrary to the authorities: see the passages cited from the civil law relating both to lineal and collateral relatives in *Wallis v Hodson* (1740) 2 Atk 114 at 118 per Lord Hardwicke LC.

9 *Burdet v Hopegood* (1718) 1 P Wms 486 (devise in case testator had no son at the time of his death); *Pearce v Carrington* (1873) 8 Ch App 969 (if daughter should be living five years after death of wife and should not then have had any child or children). In *Villar v Sir Walter Gilbey* [1907] AC 139, HL, also a case of a condition, the rule was excluded on the ground of want of benefit.

10 See PARA 638 ante.

11 *Re Corlass* (1875) 1 ChD 460 (where one of the testator's daughters was pregnant, although unmarried, at the date of distribution but married before the child was born, thus rendering it legitimate; but, as this was not its status at the date of distribution, the child did not take).

12 *Re Stern's Will Trusts, Bartlett v Stern* [1962] Ch 732, [1961] 3 All ER 1129 (appointment, under power contained in will, to any widow of W born in testator's lifetime; widow en ventre sa mère at testator's death entitled as being within reason and motive of testator's gift).

13 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1013.

14 See PARA 673 post.

15 *Roper v Roper* (1867) LR 3 CP 32 (where the parent was held to take an estate of inheritance solely); but see *Mason v Clarke* (1853) 17 Beav 126 at 130 (bequest).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/B. IDENTIFICATION BY REFERENCE TO OFFICE OR EMPLOYMENT/648. Gifts to executors.

B. IDENTIFICATION BY REFERENCE TO OFFICE OR EMPLOYMENT

648. Gifts to executors.

The question whether a disposition by a testator in favour of his executor is to be considered as taken by him by virtue of his office or beneficially is considered elsewhere in this work¹. Under a gift to the executors of another person, whether directly or by way of substitution for him, prima facie they take the gift as part of his estate², but the will may show that they were intended to take beneficially³.

1 As to the presumption that a legacy is given to an executor as such see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 490-491; and as to the effect of a provision that residue is to be at the disposal of the executor see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 585, 618, 637.

2 *Stocks v Dodsley* (1836) 1 Keen 325; *Long v Watkinson* (1852) 17 Beav 471; *Leak v Macdowall (No 2)* (1863) 33 Beav 238; *Trethewy v Helyar* (1876) 4 ChD 53; *Re Valdez' Trusts* (1888) 40 ChD 159 at 162.

3 *Sanders v Franks* (1817) 2 Madd 147; *Wallis v Taylor* (1836) 8 Sim 241.

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649. Effect of bequest to a person's representatives.

In a bequest of personal estate to the 'representatives' of any person, whether simply or with the added qualification of 'legal' or 'personal' or 'legal personal', the description is taken in its ordinary sense and prima facie designates the executors or administrators of that person¹. 'Representatives' is, however, capable of being interpreted in any sense required by the context², and this may show that the description means descendants³, or next of kin⁴, as, for example, where it is shown that the donees were to take beneficially and not in any fiduciary capacity⁵. The circumstance that the gift is to the person or his representatives immediately on the testator's death, and not after a life interest, is not a reason for giving to personal representatives the meaning of next of kin⁶.

1 *Re Brooks, Public Trustee v White* [1928] Ch 214, CA. A gift to a person for life, and after his death to his personal representatives, gives him an absolute interest: see *Re Brooks, Public Trustee v White* supra; and PARA 661 post. For cases establishing this construction of 'representatives' see *Corbyn v French* (1799) 4 Ves 418 at 434-435; *Price v Strange* (1820) 6 Madd 159; *Saberton v Skeels* (1830) 1 Russ & M 587; *Hinchcliffe v Westwood* (1848) 2 De G & Sm 216; *Re Crawford's Trusts* (1854) 2 Drew 230 ('to my cousins german now existing, or their representatives'); *Re Wyndham's Trusts* (1865) LR 1 Eq 290 (husband, as general administrator, preferred to executor of will); *Re Ware, Cumberlege v Cumberlege-Ware* (1890) 45 ChD 269. Cf *Re Best's Settlement Trusts* (1874) LR 18 Eq 686 (settlement).

2 *Re Crawford's Trusts* (1854) 2 Drew 230 at 233 per Kindersley V-C. The mere appointment of executors, or references to executors and administrators, showing that they are distinguished from personal representatives, may, but will not necessarily, give a different sense to the words: *Re Ware, Cumberlege v Cumberlege-Ware* (1890) 45 ChD 269 at 278. See also *Walter v Makin* (1833) 6 Sim 148; *Walker v Marquis of Camden* (1848) 16 Sim 329 (doubted in *Re Crawford's Trusts* supra at 241); *Alger v Parrott* (1866) LR 3 Eq 328; *Re Thompson, Machell v Newman* (1886) 55 LT 85. See also *Briggs v Upton* (1872) 7 Ch App 376 (settlement).

3 *Horsepool v Watson* (1797) 3 Ves 383 at 384 ('children and their representatives, being issue'); *Styth v Monro* (1834) 6 Sim 49 (construed 'descendants'); *Atherton v Crowther, Deudon v De Massals* (1854) 19 Beav 448; *Re Horner, Eagleton v Horner* (1887) 37 ChD 695 at 710, 712; *Re Knowles, Rainford v Knowles* (1888) 59 LT 359; *Re Bromley, Wilson v Bromley* (1900) 83 LT 315 ('natural representatives').

4 See *Long v Blackall* (1797) 3 Ves 486 ('legal personal representatives', referring to a future time); *Robinson v Smith* (1833) 6 Sim 47 (husband being a trustee, next of kin apart from husband entitled) (considered in *Stockdale v Nicholson* (1867) LR 4 Eq 359 at 368); *Booth v Vicars* (1844) 1 Coll 6 at 12 ('next legal personal representatives'); *Smith v Palmer* (1848) 7 Hare 225 (division intended); *Atherton v Crowther, Deudon v De Massals* (1854) 19 Beav 448 (to take per stirpes). These cases were decided at a time when the next of kin were determined according to the Statutes of Distribution (see PARA 632 ante). For the enactments now governing the succession to real and personal estate on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq. In *Holloway v Radcliffe* (1857) 23 Beav 163, there was an express reference to the Statutes of Distribution.

5 *King v Cleaveland* (1859) 4 De G & J 477 at 481.

6 *Re Brooks, Public Trustee v White* [1928] Ch 214, CA (following *Re Crawford's Trusts* (1854) 2 Drew 230; and overruling *Bridge v Abbot* (1791) 3 Bro CC 224 and *Cotton v Cotton* (1839) 2 Beav 67). See also *Hinchcliffe v Westwood* (1848) 2 De G & Sm 216; *Chapman v Chapman* (1864) 33 Beav 556; *Re Turner* (1865) 2 Drew & Sm 501; *Re Thompson, Machell v Newman* (1886) 55 LT 85.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/B.

IDENTIFICATION BY REFERENCE TO OFFICE OR EMPLOYMENT/650. Gifts to servants or employees.

650. Gifts to servants or employees.

Gifts to the testator's 'servants' or other donees described by their employment¹ and not by name, taking as individuals, prima facie refer to persons filling the character at the date of the will, and do not import that the employment and character must continue to the testator's death². It may appear, however, that the donees are regarded as a class to be ascertained in accordance with the ordinary rules³, and generally the context of the will may show that persons filling the character at the date of the will⁴, or at the testator's death⁵ or at any other time⁶, are designated.

1 In *Re Jones, Williams v A-G* (1912) 106 LT 941, CA, a gift to 'clerks' in the employment of a shipping company was held not to include pursers on ships which the company managed. Service in a business is continuous so as to qualify for a legacy where the testator has transferred the business, but remains manager: *Re Howell's Trusts, Barclays Bank Ltd v Simmons* [1937] 3 All ER 647.

2 *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 299 per Knight Bruce V-C; *Re Miller, Galloway v Miller* (1913) 135 LT Jo 10. For a similar rule with regard to descriptions generally see PARA 591 ante. The presumption is that legacies to servants are in satisfaction of wages due, if any: *Richardson v Greese* (1743) 3 Atk 65; *Ellard v Phelan* [1914] 1 IR 76.

3 See *Re Marcus, Marcus v Marcus* (1887) 57 LT 399 at 400; and PARA 593 et seq ante.

4 *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 (distinguished in *Re Marcus, Marcus v Marcus* (1887) 57 LT 399, on the ground of a preceding gift to three named persons who were servants at the date of the codicil); *Jones v Henley* (1685) 2 Rep Ch 361 (where the gift was construed to be to servants at the date of the will who continued as such until the death of the testator).

5 *Re Marcus, Marcus v Marcus* (1887) 57 LT 399; *Re Bell, Wright v Scrivener* (1914) 58 Sol Jo 517 (chauffeur entitled as a 'man servant').

6 *Re Sharland, Kemp v Rozey* [1896] 1 Ch 517; *Re Miller, Galloway v Miller* (1913) 135 LT Jo 10. As to a gift of a year's wages to a servant see *Blackwell v Pennant* (1852) 9 Hare 551 at 554; *Re Ravensworth, Ravensworth v Tindale* [1905] 2 Ch 1, CA; *Re Earl of Sheffield, Ryde v Bristow* [1911] 2 Ch 267, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/B. IDENTIFICATION BY REFERENCE TO OFFICE OR EMPLOYMENT/651. Persons who may benefit under gift to servants.

651. Persons who may benefit under gift to servants.

Whether persons are included in the description 'servants' or 'employees' depends on the context and the circumstances¹. Thus a gift to 'servants living with me at the time of my death' or 'servants in my service at the time of my death' is not confined to persons actually living in the same house with the testator, but, in the ordinary sense of the words, includes persons who are wholly in his service and not free to serve others². A servant or employee who before the testator's death leaves his service, either voluntarily³ or even on a wrongful dismissal⁴, is not entitled to share in such a gift, but a temporary absence while the relationship of service continues is immaterial⁵. Gifts to 'domestic' or 'household' servants are as a rule restricted to indoor servants⁶, but there is no fixed rule that outdoor servants not boarded by the testator must be excluded, and it is a question of intention to be determined on an examination of all the circumstances⁷. The question whether 'servants' includes persons ranking above servants depends on the circumstances⁸.

1 In *Sleech v Thorington* (1754) 2 Ves Sen 560 at 564, a gift to 'the two servants that shall live with me at the time of my death' was held to include a third taken into service afterwards, the number being rejected (see PARA 563 ante). An annuity to a servant so long as she continues in the service of a person, who in fact predeceases the testator, may take effect as a life annuity: *Burchett v Woolward* (1823) Turn & R 442.

2 *Blackwell v Pennant* (1852) 9 Hare 551 at 553 per Turner V-C (following *Townshend v Windham* (1706) 12 Vern 546 and *Howard v Wilson* (1832) 4 Hag Ecc 107). See also *Chilcot v Bromley* (1806) 12 Ves 114 (coachman provided by agent excluded); *Bulling v Ellice* (1845) 9 Jur 936 (salaried farm bailiff included); *Thrupp v Collett (No 2)* (1858) 26 Beav 147 (servants living off the premises included; but a boy not continuously employed excluded, and, it seems, a charwoman would have been excluded); *Armstrong v Clavering* (1859) 27 Beav 226 (land agent and house steward devoting unemployed time to agency for other landowners included); *Re Lawson, Wardley v Bringloe* [1914] 1 Ch 682 (male nurse); *Re Travers, Hurmson v Carr* (1916) 86 LJ Ch 123 (nurse). Where the testatrix had become mentally disordered, servants appointed by her receiver were entitled: *Re Silverston, Westminster Bank Ltd v Kohler* [1949] Ch 270, [1949] 1 All ER 641. Cf *Re King, Jackson v A-G* [1917] 2 Ch 420 (servants employed by committee of person mentally disordered not entitled).

3 *Re Serres's Estate, Venes v Marriott* (1862) 8 Jur NS 882; *Re Benyon, Benyon v Grieve* (1884) 51 LT 116.

4 *Darlow v Edwards* (1862) 1 H & C 547, Ex Ch; *Re Hartley's Trusts* (1878) 47 LJ Ch 610.

5 *Herbert v Reid* (1810) 16 Ves 481 at 489 (where Lord Eldon LC, discussing evidence of the servant leaving service, said that the master must explain whether he sent her from the house as putting an end to the relation entirely, or only suspending her services); *Re Lawson, Wardley v Bringloe* [1914] 1 Ch 682; *Re Cole, Cole v Cole* [1919] 1 Ch 218 (military service) (distinguished in *Re Drake, Drake v Green* [1921] 2 Ch 99); *Re Feather, Harrison v Tapsell* [1945] Ch 343, [1945] 1 All ER 552 (on the evidence a contract of employment continued although the employee was on military service); *Re Marryat, Westminster Bank Ltd v Hobcroft* [1948] Ch 298, [1948] 1 All ER 796 (employee to have been in service of company 'at my death for a period of five years'; the period must be continuous, and, on the facts, military service could not be counted); *Re Bedford, National Provincial Bank Ltd v Aulton* [1951] Ch 905, [1951] 1 All ER 1093 ('not less than five years' service'; period need not be continuous but military service could not be counted).

6 *Ogle v Morgan* (1852) 1 De GM & G 359 (indoor servants not receiving board wages) (followed in *Vaughan v Booth* (1852) 16 Jur 808; *Re Drax, Savile v Yeatman* (1887) 57 LT 475); *Re Ogilby, Cochrane v Ogilby* [1903] 1 IR 525; *Re Lawson, Wardley v Bringloe* [1914] 1 Ch 682; *Re Forrest, Bubb v Newcomb* [1916] 2 Ch 386 (farm labourers excluded). 'Indoor and outdoor servants' does not include a resident land agent (*Re Countess of Rosse, Parsons v Earl of Rosse* (1923) 93 LJ Ch 8, CA), or an estate manager (*Re Earl Brownlow, Tower v Sedgewick* (1924) 69 Sol Jo 176); but includes the various persons, gardeners, carpenters, woodmen, farm hands etc employed in the management of a large estate (*Re Drake, Drake v Green* [1921] 2 Ch 99).

7 *Re Jackson, Jackson v Hamilton* [1923] 2 Ch 365, CA; *Re Forbes, Public Trustee v Hadlow* (1934) 78 Sol Jo 336.

8 *Re Cassel, Public Trustee v Ashley* (1922) 39 TLR 75. In *Re Marryat, Westminster Bank Ltd v Hobcroft* [1948] Ch 298, [1948] 1 All ER 796, an apprentice was held to be an 'employee'.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(2) PERSONS ENTITLED TO TAKE/(ii) Identification of Donees/B. IDENTIFICATION BY REFERENCE TO OFFICE OR EMPLOYMENT/652. Gift to holder of office.

652. Gift to holder of office.

The mere description of a donee as the holder of an office is not of itself sufficient to raise the inference that the gift is for the benefit of the office and not of the holder personally¹, unless the context and circumstances show that the holder for the time being was intended². However, a gift to a person either described as, or known to the testator as, the holder of an office, 'or his successors', or a gift to the holder of an office for the time being, is for the benefit of the office or of the association or body in which the office is held³.

1 *Doe d Phillips v Aldridge* (1791) 4 Term Rep 264; *Donnellan v O'Neill* (1870) IR 5 Eq 523. As to a gift to 'the superior' of a religious order see *Re Barclay, Gardner v Barclay, Steuart v Barclay* [1929] 2 Ch 173, CA; and as to gifts to vicars etc see CHARITIES vol 8 (2010) PARA 118.

2 *Re Corcoran, Corcoran v O'Kane* [1913] 1 IR 1.

3 *Smart v Prujean* (1801) 6 Ves 560 at 567; *Re Fowler, Fowler v Booth* (1914) 31 TLR 102, CA; *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v Barry* [1936] Ch 520, [1936] 2 All ER 93. As to whether a gift to an executor is annexed to the office see PARA 648 ante. Cf *Re Mellor, Dodgeson v Ashworth* (1912) 56 Sol Jo 596 (testatrix appointed two trustees of will and gave to each legacy of £500; she also gave an annuity to each of the trustees for the time being of her will; by a codicil she revoked the appointment of one of the trustees and appointed another, to whom she gave £50; substituted trustee entitled to an annuity, but not to a legacy of £500).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/653. No presumption as to quantity of interest.

(3) QUANTITY OF INTEREST TAKEN

(i) In general

653. No presumption as to quantity of interest.

A testator is free to give such estate as he thinks fit, consistently with law¹. There is no presumption that he means one quantity of interest rather than another; and the intended extent of the benefit can be known only from the words in which it is given². If an intention of benefit towards a particular donee is apparent on the face of the will, and the will is ambiguous as to the manner in which the gift is to take effect with regard to the property given or the interest created in it, then, in the absence of all other means of ascertaining the intention³, the court leans to the construction which is most favourable to the donee⁴.

1 As to the extent of the right of disposition see PARA 327 et seq ante.

2 *Blackburn v Stables* (1814) 2 Ves & B 367 at 370 per Grant MR. See also *Coward v Larkman* (1888) 60 LT 1 at 2, HL. As to the rules of construction of ambiguous words in wills see PARA 518 ante.

3 There is thus no room for the application of the rule where the ordinary principles of construction as to giving effect to every word (*Patching v Dubbins* (1853) Kay 1 at 13-14 per Wood V-C), and as to giving their ordinary meaning to the words (*Taylor v St Helens Corp'n* (1877) 6 ChD 264 at 270, CA, per Jessel MR), sufficiently indicate the intention: see PARA 532 et seq ante. Where the testator dies on or after 1 January 1983, extrinsic evidence, including evidence of his intention, may be admissible to assist in the interpretation of ambiguous language: see the Administration of Justice Act 1982 s 21; and PARAS 483, 506-507 ante.

4 Bac Abr, Wills and Testaments (G) 483. 'Being a grant, a devise must be taken most strongly against the grantor': *Cooper v Woolfitt* (1827) 2 H & N 122 at 125 per Pollock CB. As to the similar rule in the case of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 178. As to rights of selection given to the donee see PARA 418 ante; as to a devise of an option of purchase of the testator's land at a fixed price see PARA 416 ante; and as to the devolution of emblements see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 349.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/654. Reduction or extension of interest.

654. Reduction or extension of interest.

An interest apparently in fee simple in real estate, or an interest in personal estate, may be made subject to defeasance¹, or may, in the context of the whole will, be reduced to a life interest². Similarly, a life interest may be extended to an absolute interest³, or may be reduced by the context to an estate until remarriage or other event⁴.

If a beneficiary in tail does not fall within the true scope of a provision in the will reducing estates tail to life estates, because he is born outside the period referred to in that provision, his estate tail is not reduced and can validly be barred by a disentailing deed⁵; and an absolute interest⁶ subject to an executory gift over on a contingency remains absolute if the contingency does not happen⁷.

It is, however, a settled rule of construction that a clear gift is not reduced by anything subsequent in the will which does not with reasonable certainty indicate the testator's intention to reduce it⁸. Moreover, if a testator who dies on or after 1 January 1983⁹ devises or bequeaths property to his spouse in terms which in themselves would give an absolute interest to the spouse, but by the same instrument purports to give his issue an interest in the same property, the gift to the spouse is presumed to be absolute, notwithstanding the purported gift to the issue, except where a contrary intention is shown¹⁰.

1 *Bird v Webster* (1853) 1 Drew 338.

2 *Sherratt v Bentley* (1834) 2 My & K 149; *Joslin v Hammond* (1834) 3 My & K 110; *Hayes v Hayes* (1836) 1 Keen 97; *Morrall v Sutton* (1842) 5 Beav 100 (on appeal (1845) 1 Ph 533); *Earl of Lonsdale v Countess Barcholdt* (1854) Kay 646; *Johnston v Antrobus* (1856) 21 Beav 556; *Re Bagshaw's Trusts* (1877) 46 LJ Ch 567, CA; *Re Houghton, Houghton v Brown* (1884) 53 LJ Ch 1018; *Re Russell* (1885) 52 LT 559, CA; *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939 at 942; *Re Lupton* [1905] P 321. See also *Goodtitle d Cross v Wodhull* (1745) Willes 592. An interest may be so reduced even though the gift over is of 'whatever remains' or in similar terms: see PARA 666 post. If the prior interest is not so reduced, such a gift over is void: see PARAS 665-666 post.

3 A gift of personal estate to a person for his life, and after his death to his executors, confers an absolute interest: see *Re Brooks, Public Trustee v White* [1928] Ch 214, CA; and PARA 649 ante. As to such gifts with an intervening general power of appointment see POWERS vol 36(2) (Reissue) PARA 222; and as to unlimited gifts of income being gifts of capital see PARA 659 post.

4 *Meeds v Wood* (1854) 19 Beav 215 at 222. See also *Lancaster v Varty* (1826) 5 LJOS Ch 41. Conversely, an estate may be extended. Thus a devise to a wife for life provided that she remains a widow, but in case she remarries, then to J S when he attains 23, gives an estate until J S attains 23, even if she remarries before: *Doe d Dean and Chapter of Westminster v Freeman* (1786) 1 Term Rep 389. See also *Re Cabburn, Gage v Rutland* (1882) 46 LT 848.

5 *Re Watson, Culme-Seymour v Brand* [1930] 2 Ch 344.

6 There must first be an absolute gift: *Re Cohen's Will Trusts, Cullen v Westminster Bank Ltd* [1936] 1 All ER 103. As to the rule in *Lassence v Tierney* (1849) 1 Mac & G 551 see PARA 522 ante.

7 *Watkins v Weston* (1863) 3 De GJ & Sm 434; *Re Bourke's Trusts* (1891) 27 LR Ir 573; *Parnell v Boyd* [1896] 2 IR 571, Ir CA. See also *Re Lady Monck's Will, Monck v Croker* [1900] 1 IR 56, Ir CA.

8 *Thornhill v Hall* (1834) 2 Cl & Fin 22 at 36, HL; *Fetherston v Fetherston* (1835) 3 Cl & Fin 67 at 73, 75, HL; *Re Roberts, Percival v Roberts* [1903] 2 Ch 200 at 204; *Re Freeman, Hope v Freeman* [1910] 1 Ch 681 at 691, CA. This rule does not mean, however, that the court is to make a comparison between the two clauses in question as to lucidity: *Randfield v Randfield* (1860) 8 HL Cas 225 at 235 per Lord Campbell. The rule has, however, often been stated as requiring the subsequent clause to be 'equally' clear with the first, eg as meaning that words which cut down a gift clearly given should be as clear as the words which confer it: see *Doe d Hearle v Hicks* (1832) 8 Bing 475, HL; *Kiver v Oldfield* (1859) 4 De G & J 30 at 37; *Leslie v Earl of Rothes* [1894] 2 Ch 499 at 516, CA. The rule applies not only where the question is one of the revocation of a legacy, but also as between one donee and another person claiming to be donee under the same will: *Re Freeman, Hope v Freeman* [1910] 1 Ch 681 at 687, CA.

9 Ie the date on which the Administration of Justice Act 1982 s 22 came into force: see s 76(11). Nothing in s 22 affects the will of a testator who died before 1 January 1983: s 73(6)(c).

10 Ibid s 22. As from a day to be appointed, a similar rule is to apply under the Civil Partnership Act 2004 s 71, Sch 4 para 5 (not yet in force) where a testator gives property to his civil partner, but purports to give his issue an interest in the same property. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 ante). As to clear absolute gifts in the first instance see generally para 666 post.

UPDATE

654 Reduction or extension of interest

NOTE 10--Day now appointed: SI 2005/3175.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/655. Effect of stated purpose.

655. Effect of stated purpose.

If, when making a gift by will, a testator expresses in it a purpose, one of two alternative constructions may be applicable: the gift may be a devise or bequest to a donee either for the particular purpose but not for that purpose only, in which case a beneficial interest is conferred subject to the particular purpose, or for the particular purpose and nothing more, in which case (apart from the particular purpose) no beneficial interest is conferred on the immediate donee¹. Thus a gift may be subject to a trust extending either to the whole of it², or to part of it³ or to a personal obligation for maintenance of children⁴, in which case an inquiry may be directed as to the proper amount to be applied⁵. If, however, the context allows⁶, the purpose is treated merely as the testator's motive in making the gift, which is intended to increase the donee's funds to enable him to accomplish that purpose⁷, and the donee takes an unfettered interest⁸.

1 See the principle adopted by Sir Raymond Evershed MR in *Re Rees, Williams v Hopkins* [1950] Ch 204 at 207-208, [1949] 2 All ER 1003 at 1005, CA (citing *King v Denison* (1813) 1 Ves & B 260 at 272 per Lord Eldon). See also *Irvine v Sullivan* (1869) LR 8 Eq 673; *Croome v Croome* (1889) 61 LT 814, HL; *Re West, George v Grose* [1900] 1 Ch 84; *Re Foord, Foord v Conder* [1922] 2 Ch 519. As to where phrases such as 'subject to' or 'on condition that' are used see PARA 691 post. See also *Re Gardner, Huey v Cunningham* [1920] 1 Ch 523, CA ('knowing that he will carry out my wishes'); *Re Dulson* (1929) 45 TLR 228 ('in trust on the understanding that'); *Re Williams, Williams v All Souls, Hastings, Parochial Church Council* [1933] Ch 244 ('knowing that he is fully aware of my intention') (distinguishing *Re Falkiner, Mead v Smith* [1924] 1 Ch 88). As to precatory trusts see TRUSTS vol 48 (2007 Reissue) PARA 627. As to secret trusts see PARAS 509-511 ante; and TRUSTS vol 48 (2007 Reissue) PARA 672 et seq.

2 *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA. See also *Cooper v Thornton* (1790) 3 Bro CC 96; *Robinson v Tickell* (1803) 8 Ves 142; *Blakeney v Blakeney* (1833) 6 Sim 52; *Wetherell v Wilson* (1836) 1 Keen 80; *Wood v Richardson* (1840) 4 Beav 174; *Ford v Fowler* (1840) 3 Beav 146; *Hodgson v Green* (1842) 11 LJ Ch 312; *Inderwick v Inderwick* (1844) 13 Sim 652; *Barnes v Grant* (1856) 26 LJ Ch 92; *Wainford v Heyl* (1875) LR 20 Eq 321; *Mclsaac v Beaton* (1905) 37 SCR 143; *Re De la Hunty, O'Connor v Butler* [1907] 1 IR 507 at 511; *Re Hickey, Hickey v Hickey* [1913] 1 IR 390, Ir CA.

3 *Raikes v Ward* (1842) 1 Hare 445 at 450; *Longmore v Elcum* (1843) 2 Y & C Ch Cas 363; *Crockett v Crockett* (1848) 2 Ph 553; *Costabadie v Costabadie* (1847) 6 Hare 410 at 414; *Hart v Tribe* (1854) 18 Beav 215. Where children take beneficially, they take, according to the context, either concurrently with the donee (*Jubber v Jubber* (1839) 9 Sim 503; *Wilson v Maddison* (1843) 2 Y & C Ch Cas 372; *Re Nolan, Sheridan v Nolan* [1912] 1 IR 416; *Re Campbell, McCabe v Campbell* [1918] 1 IR 429) or in succession to him (*Chambers v Atkins* (1823) 1 Sim & St 382; *Re Whitty, Evans v Evans* (1881) 43 LT 692).

4 *Hadow v Hadow* (1838) 9 Sim 438; *Leach v Leach* (1843) 13 Sim 304; *Browne v Paull, Hoggins v Paull* (1850) 1 Sim NS 92 at 104; *Re Robertson's Trusts* (1858) 6 WR 405; *Scott v Key* (1865) 11 Jur NS 819; *Lambe v Eames* (1871) 6 Ch App 597.

5 *Hamley v Gilbert* (1821) Jac 354. Cf, however, *Thurston v Essington* (1727) Jac 361n, HL; *Re Booth, Booth v Booth* [1894] 2 Ch 282; *K'Eogh v K'Eogh* [1911] 1 IR 396.

6 In such cases the inference that an unfettered interest is intended may be drawn from the absence of any expression excluding the donee from taking beneficially (*Thorp v Owen* (1843) 2 Hare 607 at 615-616), or from the difficulty in ascertaining the amount intended to be applied for the purposes specified in every possible state of circumstances (*Thorp v Owen* supra at 615; *Cowman v Harrison* (1852) 10 Hare 234 at 239), or from the fact that the specified object necessarily depends on the choice of the named person, although he may desire it for his own convenience (*Barrs v Fewkes* (1864) 2 Hem & M 60 at 65; and see TRUSTS vol 48 (2007 Reissue) PARA 726), or that, apart from the will, the donee is already under an obligation to the specified object (*Byne v Blackburn* (1858) 26 Beav 41).

7 *Thorp v Owen* (1843) 2 Hare 607 at 614; *Benson v Whittam, Hemming v Whittam* (1831) 5 Sim 22 at 32. See also *Re Lord Llangattock, Johnson v Church of England Central Board of Finance* (1918) 34 TLR 341 (intention as affecting date of payment).

8 *Thorp v Owen* (1843) 2 Hare 607; *Ward v Biddles* (1847) 16 LJ Ch 455; *Leigh v Leigh* (1848) 12 Jur 907; *Mackett v Mackett* (1872) LR 14 Eq 49 at 53; *Farr v Hennis* (1881) 44 LT 202, CA; *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA; *Re Hill, Public Trustee v O'Donnell* [1923] 2 Ch 259 ('for the benefit of themselves and their respective families' held to be an absolute gift); *Re Stirling, Union Bank of Scotland Ltd v Stirling* [1954] 2 All ER 113, [1954] 1 WLR 763 (gift to executor with request to dispose of it in accordance with memorandum; no communication of memorandum during lifetime). Cf *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA. As to a gift to a charity where changes have taken place in the management of the charity, but without interfering with its continuity see *Re Wedgwood, Sweet v Cotton* [1914] 2 Ch 245.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/656. Benefit to donee in a particular manner.

656. Benefit to donee in a particular manner.

If a gift is of a specified amount and the purpose is to benefit the donee personally in a particular manner, it is a question of construction of the particular will whether the testator's primary object is to make the specified gift to the donee, or to have the specified purpose accomplished¹. Prima facie, in a gift otherwise unconditional, the primary object is to make the specified gift; and, where on the true construction of the will a gift has this primary object and there is also an expression of some secondary purpose, then, if this purpose is satisfied and does not exhaust the gift², or, if it becomes impossible (otherwise than through the donee's act or default)³, the gift takes effect according to the primary purpose. In such a case the donee, if sui juris, is, or his representatives after his death⁴ are, prima facie entitled to payment, without the testator's executors being bound to see to the application of the gift⁵. Where, however, the specified purpose is the primary object, the donee is entitled to the gift, but only so far as applicable to that purpose⁶ and for no other purpose⁷; and the gift may be so expressed that the cost of accomplishing that purpose may have to be paid out of the testator's estate, even though the primary fund is sufficient⁸. In such cases, so far as the purpose cannot be accomplished or becomes impossible, the gift fails⁹.

1 As to legacies made in satisfaction of a moral obligation see EQUITY vol 16(2) (Reissue) PARA 739 et seq. A bequest for such purposes as the donee thinks fit is a gift to him: *Paice v Archbishop of Canterbury* (1807) 14 Ves 364 at 370 per Lord Eldon LC. Likewise, in *Isherwood v Payne* (1800) 5 Ves 677 (gift to provide furniture or 'for any other purpose she should think proper') and *Re Harbison, Morris v Larkin* [1902] 1 IR 103 ('for whatever purposes he pleases'), the donee took an unfettered gift. See also *Dowling v Dowling* [1902] 1 IR 79 at 83.

2 *Cope v Wilmot* (1772) Amb 704 (gift not exceeding £3,000 for advancement in business; £1,000 refunded on advancement; donee entitled to balance). As to legacies to buy an annuity see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 796, 800, 802.

3 See eg *Barlow v Grant* (1684) 1 Vern 255 (gift for apprenticeship; donee died before requisite age); *Hammond v Neame* (1818) 1 Swan 35 (maintenance of children who did not exist); *Lord Amhurst v Duchess of*

Leeds (1842) 12 Sim 476 (gift to pay rent of any residence donee might choose; donee living rent free with son; unconditional gift); *Lockhart v Hardy* (1846) 9 Beav 379 (gift to pay off a mortgage which was foreclosed during the testator's lifetime); *Gough v Bult* (1848) 16 Sim 45 at 54 (gift not exceeding £2,000 for advancement; donee died before advance made; donee's executors entitled to £2,000); *Parsons v Coke* (1858) 27 LJ Ch 828 (gift to carry on testator's business; business subsequently sold by testator); *Palmer v Flower* (1871) LR 13 Eq 250 (gift for purchase of army commission; right of purchase abolished); *Hutchinson v Rough* (1879) 40 LT 289 (gift to establish donee in profession; donee not adopting profession); *Adams v Loddell* (1890) 25 LR Ir 311; *Re Segelcke, Ziegler v Nicol* [1906] 2 Ch 301 (gift of legacy to make donee's gifts up to an amount already exceeded); *Re Osoba, Osoba v Osoba* [1979] 2 All ER 393, [1979] 1 WLR 247, CA (where a gift of residue on trust for the benefit of a widow, an aged mother (maintenance) and a daughter (training up to university grade) was held to be an absolute trust for all three as joint tenants so that the daughter was absolutely entitled after the death of the others). A gift to a minor for a particular purpose is effectual notwithstanding the failure of the purpose: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 43.

4 *Barlow v Grant* (1684) 1 Vern 255; *Lewes v Lewes* (1848) 16 Sim 266.

5 *Apreece v Apreece* (1813) 1 Ves & B 364 (gift to buy a ring); *Re Skinner's Trusts* (1860) 1 John & H 102 (printing a book). See also *Knox v Lord Hotham* (1845) 15 Sim 82 (purchase of house); *Noel v Jones* (1848) 16 Sim 309 (education of minor); *Dowling v Dowling* [1902] 1 IR 79 (purchase of house). The mere fact that a third person would benefit if the legacy were applied for the specified purpose does not affect the legatee's right: *Adams v Loddell* (1890) 25 LR Ir 311; *Earl of Mexborough v Savile* (1903) 88 LT 131 (gift to pay estate duty).

6 This applies to capital as well as to income: *Re Black, Falls v Alford* [1907] 1 IR 486, Ir CA.

7 *Dick's Trustees v Dick* (1911) 48 SLR 325 (gift for education of donee in his profession; special diploma there held not included).

8 *Milner v Milner* (1748) 1 Ves Sen 106 (gift of miscalculated sum to make up daughter's fortune to named amount); *Re Sanderson's Trusts* (1857) 3 K & J 497.

9 *Re De Crespigny, De Crespigny v De Crespigny* [1886] WN 24, CA; cf *Re Ward's Trusts* (1872) 7 Ch App 727.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/657. Gift at discretion of named person.

657. Gift at discretion of named person.

Where a clear gift is made and the application of the gift is left to the discretion of another person, on the true construction of the gift the discretion given may be ineffective¹. The donee is not, however, so entitled where the discretion extends to deciding what is the amount of the gift and whether it is to be given at all².

1 *Gough v Bult* (1848) 16 Sim 45 at 54 per Lord Cottenham LC. See also *Beevor v Partridge* (1840) 11 Sim 229; *Re Johnston, Mills v Johnston* [1894] 3 Ch 204. Cf *Gude v Worthington* (1849) 3 De G & Sm 389.

2 *Re Johnston, Mills v Johnston* [1894] 3 Ch 204 at 208. See also *Cowper v Mantell (No 2)* (1856) 22 Beav 231; *Re Sanderson's Trust* (1857) 3 K & J 497.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(i) In general/658. Gift to benefit particular property.

658. Gift to benefit particular property.

Where a sum of money is directed to be laid out for particular purposes in connection with certain property and, although no donee is specified, it is clear that the testator's intention was to benefit the persons entitled to the property, those persons are entitled to that money even though the particular purposes fail¹. Where they are absolutely entitled to the property, those persons are entitled to the money, whether it is actually laid out for the purposes or not².

1 *Earl of Lonsdale v Countess Berchtholdt* (1857) 3 K & J 185.

2 *Re Bowes, Earl of Strathmore v Vane* [1896] 1 Ch 507. Cf *Re Colson's Trusts* (1853) Kay 133; *Cox v Sutton* (1856) 2 Jur NS 733 (gift as a repairing fund for the benefit of the persons in possession of an estate); *Kennedy v Kennedy* [1914] AC 215, PC.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/A. ABSOLUTE INTERESTS/659. Unlimited gifts of rents or income.

(ii) Absolute and Life Interests

A. ABSOLUTE INTERESTS

659. Unlimited gifts of rents or income.

An unlimited devise¹ of the rents and profits of land is prima facie a gift of the land itself², and an unlimited bequest of dividends, interest, income or produce of personal property, or of a mixed fund, is prima facie a gift of the capital or corpus of the property or fund³. This rule does not, however, apply to a gift of income to a charity, as a charity continues in perpetuity and effect can validly be given to a perpetual trust of income for its purposes⁴. Moreover, the rule may be excluded where the will shows an intention not to dispose of the corpus of the property⁵, as where the donee is to take an interest of the same nature as another donee who expressly takes a life interest only⁶; and it does not apply where the gift of income is not unlimited⁷, or where the gift is not of all the benefits arising from the property⁸, but merely of a particular benefit⁹, or a benefit to be enjoyed by the donee personally¹⁰. Thus a gift of an annuity not previously existing is prima facie for the donee's life only¹¹, but the testator's intention to give a larger interest to the donee, or to render the annuity perpetual, may be inferred from the language of the will¹²; and a distinction is to be drawn between a gift of an annuity charged on property and a gift of a share of the income of property unlimited in point of time¹³. It makes no difference whether the income is given to the donee directly or through the intervention of trustees¹⁴. A charge on the rents, dividends and income of property indefinitely may in similar cases be a charge on the property itself¹⁵.

If, being entitled to land subject to a lease, a testator devises the 'rent' or 'ground rent' of the land without expressly disposing of his reversion, the devise prima facie includes not only the rent payable during the lease, but also the testator's whole interest in the land¹⁶.

A gift of income to a spinster so long as she continues single and unmarried may¹⁷ be construed as a gift of the income for a period indefinite in point of time and not ceasing with her death unmarried, and thus may amount to a gift of the capital in that event¹⁸. Where, however, there is a gift of income until marriage followed by a gift over on marriage, the donee of income is not entitled to the corpus¹⁹, even though the gift over takes the form of a trust to settle the corpus for her benefit on her marriage²⁰.

1 Apart from the Wills Act 1837 s 28 (see PARA 660 post), the gift would itself, and without any assistance from the context, create merely an estate for life: *Hodson v Ball* (1845) 14 Sim 558 at 571.

2 *Rayman v Gold* (1591) Moore KB 635; *Johnson v Arnold* (1748) 1 Ves Sen 169 at 171; *Murthwaite v Jenkinson* (1824) 2 B & C 357; *Stewart v Garnett* (1830) 3 Sim 398 (where it was held that the words would pass everything that was necessary to the enjoyment of the estate); *Doe d Goldin v Lakeman* (1831) 2 B & Ad 30 (where the estate was conditional); *Harvey v Harvey* (1842) 5 Beav 134; *Plenty v West* (1848) 6 CB 201; *Bignall v Rose* (1854) 24 LJ Ch 27; *Mannox v Greener* (1872) LR 14 Eq 456; Co Litt 4b; *Re Martin, Martin v Martin* [1892] WN 120; *Bates v Taylor* (1893) 19 VLR 120. See also *Charitable Donations and Bequests Comrs v De Clifford* (1841) 1 Dr & War 245; *Adshead v Willetts* (1861) 29 Beav 358; *Shacklock v Jarvis* (1872) 26 LT 682; *Baker v Blount* [1917] 1 IR 316, Ir CA. In *Mannox v Greener* supra it was held that the rule was not confined to a devise of 'rents and profits', the rents in that case being described as 'income'. Where, however, a gift of property (eg 'hereditaments') to trustees is sufficient to include an advowson with other property, a trust of the 'rents and annual income' of that property, expressly for life, is not ordinarily sufficient to include the right of new presentation to that advowson (*Martin v Martin* (1842) 12 Sim 579), although a trust of the 'rents and profits' would be sufficient to include that right (*Sherrard v Lord Harborough* (1753) Amb 165 at 167; *Earl of Albemarle v Rogers* (1796) 7 Bro Parl Cas 522, HL; *Cooke v Cholmondeley* (1854) 3 Drew 1; *Cust v Middleton* (1864) 34 LJ Ch 185). See also ECCLESIASTICAL LAW vol 14 para 776.

3 *Elton v Shephard* (1781) 1 Bro CC 532; *Philipps v Chamberlaine* (1798) 4 Ves 51 at 58; *Page v Leapingwell* (1812) 18 Ves 463; *Adamson v Armitage* (1815) 19 Ves 416 at 418; *Stretch v Watkins* (1816) 1 Madd 253; *Clough v Wynne* (1817) 2 Madd 188; *Haig v Swiney* (1823) 1 Sim & St 487; *Benson v Whittam, Hemming v Whittam* (1831) 5 Sim 22; *Phillips v Eastwood* (1835) L & G temp Sugd 270 at 296; *Mackworth v Hinxman* (1836) 2 Keen 658; *Stephenson v Dowson* (1840) 3 Beav 342; *Humphrey v Humphrey* (1851) 1 Sim NS 536 (where other gifts were given 'absolutely'); *Southouse v Bate* (1851) 16 Beav 132; *Jenings v Baily* (1853) 17 Beav 118 (where legacies given at the death of the donee did not exclude the rule); *Tyrell v Clark* (1854) 2 Drew 86; *Boosey v Gardner* (1854) 18 Beav 471 (on appeal on another point 5 De GM & G 122); *Dowling v Dowling* (1866) 1 Ch App 612; *Cooney v Nicholls* (1881) 7 LR Ir 107 at 115, Ir CA; *Davidson v Kimpton* (1881) 18 ChD 213 at 217; *Re L'Herminier, Mounsey v Buston* [1894] 1 Ch 675 at 676 (where the rule was applied to a power to appoint the income of a fund); *Wiley v Chanteperdrix* [1894] 1 IR 209 at 214; *Tredennick v Tredennick* [1900] 1 IR 354; *Sheridan v O'Reilly* [1900] 1 IR 386 at 388, 397; *Re Lawes-Wittewronge, Maurice v Bennett* [1915] 1 Ch 408 (where a gift of net profits was held to carry the capital of shares in companies but not of debentures); *Baker v Blount* [1917] 1 IR 316, Ir CA (where the rule was applied to a gift of part of the income).

4 *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] Ch 346, [1960] 1 All ER 42, CA.

5 See *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 227, CA, per Lindley LJ. See also *Re Rawlins' Trusts* (1890) 45 ChD 299, CA; affd sub nom *Scalé v Rawlins* [1892] AC 342, HL.

6 See *Re Morgan, Morgan v Morgan* [1893] 2 Ch 222 at 228, CA, per Lindley LJ. See also *Wynne v Wynne* (1837) 2 Keen 778 at 791; *Blann v Bell* (1852) 2 De GM & G 775 at 781 (sum of bank annuities).

7 *Buchanan v Harrison* (1861) as reported in 31 LJ Ch 74 at 79. See also *Sansbury v Read* (1805) 12 Ves 75; *Re Mason, Mason v Mason* [1910] 1 Ch 695 at 700, CA; *Re Orr, M'Dermott v Anderson* [1915] 1 IR 191 (so long as widow should remain unmarried, but in case she should remarry, then the interest on half the amount).

8 Shep Touch (8th Edn) 89.

9 Co Litt 4b; and see REAL PROPERTY vol 39(2) (Reissue) PARA 76. As to devises of a right of use and occupation of land see PARA 663 post.

10 The fact that the donee was a married woman, and that the income was given to her for her separate use, was not sufficient to exclude the rule: *South v Alleine* (1695) 1 Salk 228; *Elton v Shephard* (1781) 1 Bro CC 532; *Adamson v Armitage* (1815) 19 Ves 416; *Tawney v Ward* (1839) 1 Beav 563; *Humphrey v Humphrey* (1851) 1 Sim NS 536; *Watkins v Weston* (1863) 3 De GJ & Sm 434; *Eppe v Stone* (1906) 3 CLR 412.

11 See PARA 660 text and note 9 post.

12 As to the duration of gifts of income generally see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 811 et seq; TRUSTS vol 48 (2007 Reissue) PARA 744 et seq. As to whether an annuity is payable out of capital or income see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 825-830; TRUSTS vol 48 (2007 Reissue) PARA 647.

13 See eg *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 228, 230, CA, per Lindley LJ.

14 *Haig v Swiney* (1823) 1 Sim & St 487 at 490.

15 *Baines v Dixon* (1747) 1 Ves Sen 41; *Allan v Backhouse* (1813) 2 Ves & B 65 (affd (1821) Jac 631); *Phillips v Gutteridge* (1862) 3 De GJ & Sm 332 at 336; *Metcalfe v Hutchinson* (1875) 1 ChD 591 at 594; *Re Green, Baldock v Green* (1888) 40 ChD 610 (where the rule was excluded); *Re Young, Brown v Hodgson* [1912] 2 Ch

479 at 482, 486 (referring to *Hambro v Hambro* [1894] 2 Ch 564 (terminable annuity)); *Ramsay v Lowther* (1912) 16 CLR 1 at 18-19 (gift of rents; not indefinite). See also RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 828.

16 *Kerry v Derrick* (1605) Cro Jac 104; *Maundy v Maundy* (1735) 2 Stra 1020; *Kaye v Laxon* (1780) 1 Bro CC 76; *Walker v Shore* (1815) 19 Ves 387; *Ashton v Adamson* (1841) 1 Dr & War 198. See also *Cuthbert v Lemprière* (1814) 3 M & S 158. As to the power to devise the rent apart from the reversion see PARA 329 ante.

17 The decision first cited in note 18 infra has been much criticised: see *Re Henry Will Trust, Mussett v Smith* [1953] 1 All ER 531, [1953] 1 WLR 376 (citing *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685 at 689, CA, and *Re Mason, Mason v Mason* [1910] 1 Ch 695).

18 *Rishton v Cobb* (1839) 5 My & Cr 145 at 152 (followed in *Re Howard, Taylor v Howard* [1901] 1 Ch 412 at 413 (annuity to testator's wife 'so long as she remains unmarried')); *Re Henry Will Trust, Mussett v Smith* [1953] 1 All ER 531, [1953] 1 WLR 376. Cf *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA (where the donee did not satisfy the requirement of being the testator's 'widow'). See also *Stewart v Murdoch* [1969] NI 78 (where there was a devise and bequest of a farm and chattels to the testator's two daughters so long as they remained unmarried with a gift over on the marriage of the second daughter; neither daughter married, and the interest was held to continue). Where a testator bequeathed his residue to his wife so long as she continued his widow, and, if she married again, the balance, not to exceed £400, was given over, the widow on remarriage took everything, except the sum of £400, absolutely: *Re Rowland, Jones v Rowland* (1902) 86 LT 78 (but as to the absolute interest there held to have been taken see the criticisms of the case in *Re Johnson* (1912) 27 OLR 472 at 477).

19 *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA; *Re Barklie, M'Calmont v Barklie* [1917] 1 IR 1.

20 *Re Henry Will Trust, Mussett v Smith* [1953] 1 All ER 531, [1953] 1 WLR 376.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/A. ABSOLUTE INTERESTS/660. Devise of realty.

660. Devise of realty.

Before the Wills Act 1837, a limitation to the devisee 'and his heirs' was in general required in order to give him an estate in fee simple, but this rule was not applied with the same strictness as in a grant by deed¹, and it was sufficient if the testator used words such as 'for ever'², or gave other indications of an intention that the entire fee should pass³. If, however, 'his heirs' was omitted, and there were no words or circumstances showing such an intention, the devisee took only an estate for his life⁴.

This rule for the construction of the interest taken under a devise was altered by the Wills Act 1837, which provides that, where any real estate⁵ has been devised to any person without any words of limitation, the devise is to be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate⁶, unless a contrary intention⁷ appears by the will⁸. This rule is applicable only to real estate which exists and belongs to the testator at the time of his death and over which he has then a disposing power, and does not apply to a particular interest in real estate, or an annuity or rentcharge, which the testator is about to create for the first time by his will⁹.

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 93. In a will 'executor' was as good as 'heir' as a word of limitation to pass the fee simple in real estate (*Rose d Vere v Hill* (1766) 3 Burr 1881 at 1885 (to survivors 'and their representatives'); *Stein v Ritherdon* (1868) 37 LJ Ch 369 at 371), but 'assigns' showed a power of alienation and nothing more (*Milman v Lane* [1901] 2 KB 745 at 750, CA).

2 Co Litt 9b; *Chamberlaine v Turner* (1628) Cro Car 129; *Timewell v Perkins* (1740) 2 Atk 102; *Eastman v Baker* (1808) 1 Taunt 174 at 182; *Doe d Lady Dacre v Roper* (1809) 11 East 518 (referring to the rule as settled without question from 1348 (YB 22 Edw 3, Mich 16) to that day, with the exception of a doubt in Perkins's Laws

of England s 557); *Evans v Evans* (1865) 33 LJ Ch 662. Such words did not enlarge an express estate tail into a fee simple: *Vernon v Wright* (1858) 7 HL Cas 35.

3 Thus an intention to give a fee simple might be inferred: (1) from the fact that the donee was required personally to undertake charges on or to pay a sum of money out of the estate (*Doe d Witley v Holmes* (1798) 8 Term Rep 1; *Good v Good* (1857) 7 E & B 295; *Lloyd v Jackson* (1867) LR 2 QB 269 at 273-274; *Bolton v Bolton* (1870) LR 5 Exch 145), but not where the money was charged merely on the estate given, and not on the donee personally (*Denn d Moor v Mellor* (1794) 5 Term Rep 558; affd sub nom *Moor v Denn d Mellor* (1800) 2 Bos & P 247, HL); (2) from the use by the testator in the operative part of the gift of the word 'estate', 'property', or any equivalent expression capable of describing the extent and sum of the testator's interest as well as the substance of the gift, unless used merely by way of reference (*Bailis v Gale* (1750) 2 Ves Sen 48; *Doe d Burton v White* (1847) 1 Exch 526 (affd (1848) 2 Exch 797, Ex Ch); *Re Pollard's Estate* (1863) 3 De GJ & Sm 541 at 556; *Coltsmann v Coltsmann* (1868) LR 3 HL 121 at 129; *Hill v Brown* [1894] AC 125 at 127-128, PC); (3) in certain circumstances from gifts over, which were inconsistent with the donee taking only a life estate (*Burke v Annis* (1853) 11 Hare 232 at 237; *Andrew v Andrew* (1875) 1 ChD 410 at 418, CA); or (4) where this construction was required in order to make the estates of trustees and beneficiaries commensurate (*Challenger v Shephard* (1800) 8 Term Rep 597; *Yarrow v Knightly* (1878) 8 ChD 736 at 739, 743, CA; and see *Smith v Smith* (1861) 8 Jur NS 459).

4 *Doe d Brodbelt v Thomson* (1858) 12 Moo PCC 116; *Bolton v Bolton* (1870) LR 5 Exch 145.

5 For the meaning of 'real estate' see PARA 573 note 3 ante.

6 As to the interests which a general devise passes apart from this rule see PARA 575 ante.

7 The contrary intention must be gathered from the whole will: *Crumpe v Crumpe* [1900] AC 127 at 131, HL, per Earl of Halsbury LC; *Pelham-Clinton v Duke of Newcastle* [1902] 1 Ch 34 at 37 per Buckley J (affd [1903] AC 111, HL). A contrary intention appeared in: *Gravenor v Watkins* (1871) LR 6 CP 500; *Quarm v Quarm* [1892] 1 QB 184 (devise to several 'as joint tenants and not as tenants in common, and to the survivor or longest liver of them, his or her heirs and assigns'); *Re Gannon, Spence v Martin* [1914] 1 IR 86 (interest described as a tenancy). In the following cases a contrary intention was held not to be shown: *Wisden v Wisden* (1854) 2 Sm & G 396 (use of words of limitation in other gifts); *Brook v Brook* (1856) 3 Sm & G 280 (gift to married woman for her separate property with power to appoint the same to her husband and children). The creation of successive estates after the gift in question is an indication of contrary intention, but not necessarily of an intention to create only life estates: *Re Pennefather, Savile v Savile* [1896] 1 IR 249 at 260. Restrictions on alienation (see PARA 665 post) may be such an indication of contrary intention: *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939 at 942.

8 Wills Act 1837 s 28.

9 *Nichols v Hawkes* (1853) 10 Hare 342 at 343-344 per Turner V-C. See also RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 812.

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661. Bequest of personalty.

Whatever the date of a will, a gift of personal estate to a donee without any context restricting his interest confers on him an absolute interest¹. When personal property is bequeathed by will to a person for his life and after his death to his personal representatives, the bequest is ordinarily construed as an absolute gift to him, as, unless the will shows the contrary, the testator is assumed to have intended the personal representatives to take in their official capacity². The gift is so construed even though the life interest is liable to forfeiture on bankruptcy and the contingency has not happened³, or a power to appoint by will is inserted between the life interest and the gift to the personal representatives⁴.

1 *Powell v Boggis* (1866) 35 Beav 535 at 541; *Re Russell* (1885) 52 LT 559, CA. A bequest of personalty to a person and his heirs gives him an absolute interest: *Re McElligott, Grant v McElligott* [1944] Ch 216, [1944] 1 All

ER 441 (residuary bequest to testator's wife and her heirs for her and their use and benefit absolutely and forever, the Law of Property Act 1925 s 131 having no application).

2 Co Litt 54b; *Holloway v Clarkson* (1843) 2 Hare 521; *Alger v Parrott* (1866) LR 3 Eq 328; *Avern v Lloyd* (1868) LR 5 Eq 383; *Wing v Wing* (1876) 24 WR 878; *Re Brooks, Public Trustee v White* [1928] Ch 214, CA. The same rule has been applied to settlements inter vivos: see *Re Best's Settlement Trusts* (1874) LR 18 Eq 686; and SETTLEMENTS vol 42 (Reissue) PARA 933. As to the construction of gifts to personal representatives see also PARA 649 ante.

3 *Webb v Sadler* (1873) 8 Ch App 419 (where the next beneficial interest was for the life tenant's representatives as part of his personal estate). If, however, interests (although contingent) of third persons intervene between his determinable life interest and the gift to his representatives, they are not prejudiced, as no merger occurs: *Re Chance's Settlement Trusts, Chance v Billing* (1918) 62 Sol Jo 349.

4 *Devall v Dickens* (1845) 9 Jur 550. See also *Saberton v Skeels* (1830) 1 Russ & M 587; *A-G v Malkin* (1846) 2 Ph 64; *Page v Soper* (1853) 11 Hare 321.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/A. ABSOLUTE INTERESTS/662. Effect of conferring powers of disposition.

662. Effect of conferring powers of disposition.

The interest to be taken by a donee may be defined by the powers of disposition or rights of enjoyment conferred on him. A power of disposition may itself be equivalent to the property in the subject matter of the power, or it may be merely a power of appointment¹. Independently of the context, there is nothing in the word 'disposal' essentially indicating power rather than property²; and where real or personal estate is given to a person to be at his own disposal, or in words to the like effect³, and where the context does not refer to a power or trust⁴, the effect is to create a fee simple in the case of real estate, and an absolute interest in the case of personal estate⁵. An absolute interest has been similarly inferred even where the testator contemplated dispositions made only by the donee's will⁶, or subject to other restrictions⁷, or where the gift is of a sum of money to be paid at the donee's death⁸.

1 As to the construction of such gifts in relation to the creation of powers of appointment see generally POWERS vol 36(2) (Reissue) PARA 219 et seq.

2 *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584 at 586. Power is a restraint on property and is never to be implied from the word 'disposal': *Hixon v Oliver* (1806) 13 Ves 108 at 114. As to the distinction between power and property see *Re Armstrong, ex p Gilchrist* (1886) 17 QBD 521.

3 *Hixon v Oliver* (1806) 13 Ves 108; *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584; *Re Maxwell's Will* (1857) 24 Beav 246 ('to be disposed of as my son shall think proper'); *Parnell v Boyd* [1896] 2 IR 571, Ir CA; *Re Bogle, Bogle v Yorstoun* (1898) 78 LT 457; *Reid v Carleton* [1905] 1 IR 147.

4 As to a gift to be disposed of at the discretion of trustees see *Re Booth, Hattersley v Cowgill* (1917) 86 LJ Ch 270. See also *Metcalf v O'Kennedy* (1904) 4 SRNSW 175; *Re Bourk's Will, Cunningham v Rubenach* [1907] VLR 171. As to gifts to executors see PARA 648 ante.

5 *Anon* (1553) Bro NC 62; *Whiskon and Cleytons Case* (1588) 1 Leon 156; *Goodtitle d Pearson v Otway* (1753) 2 Wils 6; *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584; *Alexander v Alexander* (1856) 6 De GM & G 593; *Re Maxwell's Will* (1857) 24 Beav 246. See also *Kellett v Kellett* (1868) LR 3 HL 160 at 164, 166 (where the principle of *Lassence v Tierney* (1849) 1 Mac & G 551 (see PARA 522 ante) was confirmed).

6 *Robinson v Dusgate* (1690) 2 Vern 181; *Glover v Hall* (1849) 16 Sim 568 at 571 per Shadwell V-C ('a testamentary power of disposition is one of the incidents of the estate given'). Cf *Johnston v Rowlands* (1848) 2 De G & Sm 356; *Evans v Evans* (1865) 33 LJ Ch 662; *Weale v Ollive (No 2)* (1863) 32 Beav 421 at 424-425; *Reigh v Kearney* [1936] 1 IR 138.

7 Eg where dispositions in favour of specified persons are prohibited: *Bull v Kingston* (1815) 1 Mer 314. See also *Comber v Graham* (1830) 1 Russ & M 450.

8 *Hixon v Oliver* (1806) 13 Ves 108.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/B. LIFE INTERESTS/663. Definition by rights of enjoyment.

B. LIFE INTERESTS

663. Definition by rights of enjoyment.

The interest taken by a donee may be defined by rights of enjoyment attached to it. Thus prima facie a gift of the use¹ or of the free use and occupation² of a house or land is a gift of the rents and profits, at all events during the donee's life³, and prima facie the donee under such a gift need not personally reside in the house or on the land, but may let or dispose of the property during his life⁴. Similarly, prima facie a gift of the 'possession' or 'use and enjoyment' of chattels gives the donee a life interest⁵, and the donee may let the goods on hire⁶.

1 *Cook v Gerrard* (1668) 1 Saund 180 at 186. Even before the Wills Act 1837 a devise of land 'freely to be enjoyed and possessed' might give the fee: *Loveacres d Mudge v Blight* (1775) 1 Cowp 352; *Thomas v Phelps* (1828) 4 Russ 348. Cf *Bromitt v Moor* (1851) 9 Hare 374 at 378.

2 *Mannox v Greener* (1872) LR 14 Eq 456; *Coward v Larkman* (1888) 60 LT 1, HL. See also *PARAMOUR v Yardley* (1579) 2 Plowd 539 at 542; *Welcden v Elkington* (1576) 2 Plowd 516 at 524; *R v Easington Inhabitants* (1791) 4 Term Rep 177; *Doe d Chillcott v White* (1800) 1 East 33 (the income of a cottage 'and her living in it').

3 See *Coward v Larkman* (1888) 60 LT 1, HL (whether a gift in perpetuity can be inferred); *Public Trustee v Edmund* (1912) 32 NZLR 202. In *Whittome v Lamb* (1844) 12 M & W 813 at 820-821, a chattel interest only was inferred. Cf *Reay v Rawlinson* (1860) 29 Beav 88 (where a gift of 'grass for a cow' in a field created a profit à prendre).

4 *Clive v Clive* (1854) 2 Eq Rep 913; *Rabbeth v Squire* (1859) 4 De G & J 406 at 413; *Mannox v Greener* (1872) LR 14 Eq 456 at 461; *National Trustees, Executors and Agency Co Ltd v Keast* (1896) 22 VLR 447. An intention that occupation is intended to be personal may be shown by a gift over on ceasing to occupy (*Maclaren v Stainton* (1858) 27 LJ Ch 442; *Stone v Parker* (1860) 29 LJ Ch 874), or by other circumstances (see *Re Varley, Thornton v Varley* (1893) 62 LJ Ch 652; *Re Stewart, Stewart v Hislop* (1904) 23 NZLR 797). Even in such a case, however, there is a right of disposition conferred by the Settled Land Act 1925, provided that the donee exercises his right to occupy the house: *Re Anderson, Halligey v Kirkley* [1920] 1 Ch 175; *Re Gibbons, Gibbons v Gibbons* [1920] 1 Ch 372, CA. See SETTLEMENTS vol 42 (Reissue) PARA 827 et seq. A personal right of residence, rent free, does not entitle the donee to rents and profits in case of his non-residence: *Parker v Parker* (1863) 1 New Rep 508; *May v May* (1881) 44 LT 412. As to conditions of residence imposed on tenants for life see SETTLEMENTS vol 42 (Reissue) PARAS 741, 782.

5 *Low v Carter* (1839) 1 Beav 426 at 430; *Espinasse v Luffingham* (1846) 3 Jo & Lat 186 (plate). For circumstances showing a contrary intention see *Terry v Terry* (1862) 33 Beav 232 (use of book debts and capital). In the case of consumables, an absolute interest is created: *Montresor v Montresor* (1845) 1 Coll 693. See also PARA 413 ante.

6 *Re Williamson, Murray v Williamson* (1906) 94 LT 813 (following *Marshall v Blew* (1741) 2 Atk 217 and *Rabbeth v Squire* (1859) 4 De G & J 406).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/B. LIFE INTERESTS/664. Determinable interest.

664. Determinable interest.

A gift until bankruptcy, alienation, marriage or other event which must happen, if at all, during the life of a donee prima facie creates a determinable life interest only¹; but such a gift, or a gift 'so long as' certain circumstances continue² (even, for example, a gift so long as the donee remains unmarried³), may create an estate in fee simple or absolute interest determinable on those circumstances ceasing to exist.

1 *Jordan v Holkham* (1753) Amb 209 (during widowhood); *Banks v Braithwaite* (1863) 32 LJ Ch 198 (alienation); *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA (so long as she continues my widow and unmarried); *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA (marriage); *Re Wiltshire, Eldred v Comport* (1916) 142 LT Jo 57. A gift during widowhood determines on remarriage but is restored on the annulment of the marriage (*Re Dewhirst, Flower v Dewhirst* [1948] Ch 198, [1948] 1 All ER 147; *Re D'Alroy's Will Trusts, Crane v Lowman* [1968] 1 All ER 181, [1968] 1 WLR 120), although transactions completed during the subsistence of the remarriage and on the footing that it subsists cannot be undone (*Re Eaves, Eaves v Eaves* [1939] 4 All ER 260, CA). Cf para 661 text and note 3 ante.

2 See *Sutcliffe v Richardson* (1872) LR 13 Eq 606 (gift of an annuity 'so long as she and my son should live together').

3 *Re Howard, Taylor v Howard* [1901] 1 Ch 412; *Re Rowland, Jones v Rowland* (1902) 86 LT 78.

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C. ABSOLUTE INTEREST REDUCED TO LIFE INTEREST

665. Absolute or life interest.

It has been stated previously that a gift which is apparently absolute may be made subject to defeasance, or may be reduced to a life interest¹. Thus a gift of real property in fee simple, or of personal property for an interest which prima facie is absolute, may be made subject to an executory gift over; but a gift over which conflicts with the right of disposition attached to the gift is not permitted². Thus a restriction on the donee's right of alienation of an interest clearly given to him is repugnant to the gift and void³, and a gift over on breach of the restrictions cannot take effect⁴. A gift over if the donee dies without having disposed of the property⁵, or of so much as the donee does not dispose of⁶, is also void, if, on the construction of the will as a whole, the donee's interest is an absolute interest⁷.

1 See PARA 654 ante.

2 See PERSONAL PROPERTY vol 35 (Reissue) PARAS 1268-1269; REAL PROPERTY vol 39(2) (Reissue) PARAS 94, 115, 177.

3 See GIFTS vol 52 (2009) PARA 253; PERSONAL PROPERTY vol 35 (Reissue) PARA 1268.

4 It is the same where the gift over interferes with the devolution of the property on death: *Shaw v Ford* (1877) 7 ChD 669; *Re Ashton, Ballard v Ashton* [1920] 2 Ch 481 (gift over in the event of the donee dying mentally unfit).

5 *Gulliver v Vaux* (1746) 8 De GM & G 167n; *Lightburne v Gill* (1764) 3 Bro Parl Cas 250, HL; *Ross v Ross* (1819) 1 Jac & W 154; *Bourn v Gibbs* (1831) 1 Russ & M 614; *Re Yalden* (1851) 1 De GM & G 53; *Holmes v Godson* (1856) 8 De GM & G 152; *Bowes v Goslett* (1857) 6 WR 8; *Henderson v Cross* (1861) 29 Beav 216; *Re Dixon, Dixon v Charlesworth* [1903] 2 Ch 458. Cf *Doe d Stevenson v Glover* (1845) 1 CB 448 (doubted in *Holmes v Godson* supra); *Re O'Hare, Madden v M'Givern* [1918] 1 IR 160.

6 *Watkins v Williams, Haverd v Church* (1851) 3 Mac & G 622; *Perry v Merritt* (1874) LR 18 Eq 152; *Re Jones, Richards v Jones* [1898] 1 Ch 438 at 441; *Lloyd v Tweedy* [1898] 1 IR 5. If the donee predeceases the testator, the doctrine of repugnancy does not apply, and the gift over takes effect: *Re Dunstan, Dunstan v Dunstan* [1918] 2 Ch 304.

7 An interest in terms absolute may be reduced by the context to a life interest (see PARA 654 ante), even where the gift over is of property undisposed of (see PARA 666 post).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/C. ABSOLUTE INTEREST REDUCED TO LIFE INTEREST/666. Clear absolute gift in the first instance.

666. Clear absolute gift in the first instance.

Where there is a clear absolute gift followed by words purporting to confer a power of disposition¹ with a gift over if the power is not exercised, the absolute gift takes effect, and the gift over is inconsistent with it and is void².

Thus where personal estate is given to a named donee in terms which confer an absolute estate, and then further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not reduced and the further interests fail³. An absolute interest is not cut down by precatory words unless those words create an imperative obligation⁴.

Where there is an absolute gift of property followed by a gift over of the property after the death of the donee⁵ or after his death without issue⁶ or without leaving children⁷, or of that part of the property of which he has not disposed, the absolute gift prevails and the ultimate gift is repugnant and void⁸. It may, however, appear sufficiently clearly on the construction of the will as a whole that a gift which is in terms absolute is in fact intended as a gift of a life interest only⁹, and this construction is not prevented merely by the fact that the gift over is of 'whatever remains' or in similar terms¹⁰. Where a will conferring an absolute interest is varied by codicil, an intention may appear that the donee is to take a life interest or a life interest with a power of disposition¹¹. If there is a doubt as to what interest the donee takes, other provisions inconsistent with an absolute gift, such as a restriction on alienation¹², or a gift over on the donee disposing¹³, or failing to dispose¹⁴, of the property, may show that he is to take a life interest only.

If a testator who dies on or after 1 January 1983¹⁵ devises or bequeaths property to his spouse in terms which in themselves would give an absolute interest to the spouse, but by the same instrument purports to give his issue an interest in the same property, the gift to the spouse is presumed to be absolute, notwithstanding the purported gift to the issue, except where a contrary intention is shown¹⁶.

1 *Comber v Graham* (1830) 1 Russ & M 450; *Brook v Brook* (1856) 3 Sm & G 280; *Howorth v Dewell* (1860) 29 Beav 18; *McKenna v McCarten* [1915] 1 IR 282. 'To be at her own disposal in any way she may think best for the benefit of herself and family' is an absolute gift: *Lambe v Eames* (1871) 6 Ch App 597. See also *Re Hutchinson and Tenant* (1878) 8 ChD 540. A devise to the testator's wife, her heirs and assigns with the intention that she might enjoy the same during her life, and by her will dispose of the same as she thought proper, gave her a fee simple estate: *Doe d Herbert v Thomas* (1835) 3 Ad & El 123. An absolute gift is not reduced by the expression of a wish as to how the donee is to dispose of the property (*Re Humphrey's Estate* [1916] 1 IR 21), nor is it necessarily reduced by a direction for settlement (*Re Bannister, Heys-Jones v Bannister* (1921) 90 LJ Ch 415).

2 *Maskelyn v Maskelyn* (1775) Amb 750; *Hales v Magerum* (1796) 3 Ves 299; *Re Mortlock's Trusts* (1857) 3 K & J 456 at 457; *Doe d Herbert v Thomas* (1835) 3 Ad & El 123. See also PARA 654 ante. A gift over in default of

disposition by an absolute owner is void: see GIFTS vol 52 (2009) PARA 253; PERSONAL PROPERTY vol 35 (Reissue) PARA 1268.

3 *Hoare v Byng* (1844) 10 Cl & Fin 508, HL (to B 'and afterwards' to others); *Re Percy, Percy v Percy* (1883) 24 ChD 616 ('afterwards') (followed in *Hyndman v Hyndman* [1895] 1 IR 179 ('at their death')); *Re Gouk, Allen v Allen* [1957] 1 All ER 469, [1957] 1 WLR 493 (residuary bequest to A 'and thereafter' to her issue). It is otherwise where the interests are such that the interests other than the last can be treated as successive life interests: *Earl of Lonsdale v Countess Berchtoldt* (1854) Kay 646 ('remainder to B, remainder to C'). As to gifts with power of disposal see PARA 662 ante.

4 *Re Johnson, Public Trustee v Calvert* [1939] 2 All ER 458. As to precatory words generally see TRUSTS vol 48 (2007 Reissue) PARA 651.

5 *Thornhill v Hall* (1834) 2 Cl & Fin 22, HL; *Crozier v Crozier* (1873) LR 15 Eq 282. Cf *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68 (gift over on death of third person); *Waters v Waters* (1857) 3 Jur NS 654.

6 *Randfield v Randfield* (1860) 8 HL Cas 225; *Ley v Ley* (1841) 2 Man & G 780; *Re Mitchell, Mitchell v Mitchell* (1913) 108 LT 180. See also *Fetherston v Fetherston* (1835) 3 Cl & Fin 67, HL.

7 *Home v Pillans* (1833) 2 My & K 15; approved in *Abbott v Middleton, Ricketts v Carpenter* (1858) 7 HL Cas 68.

8 See the cases cited in PARA 665 note 6 ante.

9 See PARA 654 ante.

10 *Constable v Bull* (1849) 3 De G & Sm 411 (on further consideration (1852) 22 LJ Ch 182); *Re Thomson's Estate, Herring v Barrow* (1880) 14 ChD 263, CA; *Re Sheldon and Kemble* (1885) 53 LT 527; *Re Last* [1958] P 137, [1958] 1 All ER 316. See also *Upwell v Halsey* (1720) 1 P Wms 651; *Re Brooks' Will* (1865) 2 Drew & Sm 362; *Re Holden, Holden v Smith* (1888) 57 LJ Ch 648; *Roberts v Thorp* (1911) 56 Sol Jo 13 (no absolute gift in terms); *Re Dixon, Dixon v Dixon* (1912) 56 Sol Jo 445; *Re Wilson, Wilson v Wilson* (1916) 142 LT Jo 41; *Re Cammell, Public Trustee v A-G* (1925) 69 Sol Jo 345. Cf *Re Minchell's Will Trusts* [1964] 2 All ER 47 (where a gift 'for her lifetime, and after her death if anything should be left over . . .' was held to be an absolute gift).

11 *Re Adam's Trusts* (1865) 13 LT 347; *Bibbens v Potter* (1879) 10 ChD 733; *Re Pounder, Williams v Pounder* (1886) 56 LJ Ch 113 (power of disposition inter vivos); *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939 (general power). In *Borton v Borton* (1849) 16 Sim 552, an absolute gift was reduced by a later clause in the will to a life estate, with a power of disposition by will.

12 *Muschamp v Bluett* (1617) J Bridg 132; *Proctor v Upton* (1739) 5 De GM & G 199n; *Mortimer v Hartley* (1851) 6 Exch 47; *Re Banks' Trusts, ex p Hovill* (1855) 2 K & J 387; *Magee v Martin* [1902] 1 IR 367, Ir CA. However, the fact that the testator conceived that he could make the property perpetually inalienable does not alter the force of his words in describing the donees and their interests: *Britton v Twining* (1817) 3 Mer 176 at 183.

13 *Crumpe v Crumpe* [1900] AC 127, HL.

14 *Re Stringer's Estate, Shaw v Jones-Ford* (1877) 6 ChD 1, CA (where, although there was first an absolute gift, it was held that, on the whole will, the donee took an estate for life only, with a power of appointment by deed or will, and, since this power had not been exercised, the limitations over took effect). See also *Comiskey v Bowring-Hanbury* [1905] AC 84, HL (where an absolute gift to the testator's wife was held to be subject to an executory gift over at her death to nieces so far as she should not dispose of the estate by will in their favour); *Shearer v Hogg* (1912) 46 SCR 492.

15 Ie the date on which the Administration of Justice Act 1982 s 22 came into force: see s 76(11). Nothing in s 22 affects the will of a testator who died before 1 January 1983: s 73(6)(c).

16 Ibid s 22. As from a day to be appointed, a similar rule is to apply under the Civil Partnership Act 2004 s 71, Sch 4 para 5 (not yet in force) where a testator gives property to his civil partner, but purports to give his issue an interest in the same property. At the date at which this volume states the law, no such day had been appointed (but see PARA 382 note 1 ante). As to reduction or extension of interest see PARA 654 ante.

UPDATE

666 Clear absolute gift in the first instance

NOTE 16--Day now appointed: SI 2005/3175. See *Re Harrison; Harrison v Gibson* [2005] EWHC 2957 (Ch), [2005] 1 All ER 858 (sufficient contrary intention to displace statutory presumption).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(ii) Absolute and Life Interests/D. LIFE INTEREST ENLARGED TO ABSOLUTE INTEREST/667. Clear gift for life in the first instance.

D. LIFE INTEREST ENLARGED TO ABSOLUTE INTEREST

667. Clear gift for life in the first instance.

Where a gift is made to a person expressly for life, and after his death to be at his disposal, he does not in general take a greater beneficial interest himself than a life interest¹, and even the addition of a right of absolute disposal during his life may not enlarge his interest to an absolute interest². If, however, the words of disposition can be referred to property rather than merely to power³, they may have the effect of enlarging the interest to an absolute interest⁴.

A bequest to a donee for his absolute enjoyment during his life, and to be disposed of as he thinks fit after his death, is equivalent to a gift for life with general power of appointment by deed or will, and, on the power being exercised in his own favour⁵, the donee is entitled to the bequest absolutely⁶. If there is no right of disposition on death, the donee has a general power of appointment inter vivos⁷, and the unappointed part passes under a gift over⁸.

1 *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584 at 585 per Knight Bruce V-C. See also *Anon* (1578) 3 Leon 71 pl 108. Cf *Re Minchell's Will Trusts* [1964] 2 All ER 47 (cited in PARA 666 note 10 ante).

2 *Bradly v Westcott* (1807) 13 Ves 445 (where the distinction between property and power was discussed; the gift was to the donee for life, to be at his full, free and absolute disposal during his life); *Reith v Seymour* (1828) 4 Russ 263 (although the power of disposal was 'either by will or otherwise'); *Re Burkitt, Handcock v Studdert* [1915] 1 IR 205 (life interest, and 'at her death to be disposed of as she so wishes'). In these cases the donee took an interest for life only, with power of disposition. See also *Scott v Josselyn* (1859) 26 Beav 174 (where the donee for life had power to dispose of the capital during her life and to appoint by will); *Pennock v Pennock* (1871) LR 13 Eq 144 (where the donee for life had power to apply the capital for his own benefit). In each case there was a life estate only, with power of disposition. See also *Re Thomson's Estate, Herring v Barrow* (1880) 14 ChD 263, CA. In *Henderson v Cross* (1861) 29 Beav 216, a gift of residue with power for the donee to spend principal and interest, or any part of it, during his life was an absolute gift, and a gift over of what he did not spend was repugnant and void. See also PARA 665 ante.

3 See PARA 662 ante.

4 *Nowlan v Walsh, Nowlan v Wilde* (1851) 4 De G & Sm 584 at 586. See also *Hoy v Master* (1834) 6 Sim 568; *Reid v Carleton* [1905] 1 IR 147 (where the principle was stated by Barton J). This view has been adopted in cases where the life interest has been given for the purpose of introducing other limitations, such as to children, and the power of disposition is to take effect on the failure of these limitations: *Goodtitle d Pearson v Otway* (1753) 2 Wils 6; *Re Maxwell's Will* (1857) 24 Beav 246 at 251.

5 See *Re Stringer's Estate, Shaw v Jones-Ford* (1877) 6 ChD 1, CA.

6 *Re David's Trusts* (1859) John 495 at 500 (where the fund was in court, and a petition for payment out was equivalent to an appointment). See also *Harvey v Harvey* (1842) 5 Beav 134 (full and entire enjoyment of a leasehold held for life to the cestui que vie).

7 *Re Ryder, Burton v Kearsley* [1914] 1 Ch 865, CA (following *Re Richards, Uglow v Richards* [1902] 1 Ch 76; and not adopting the dictum of James LJ in *Re Thomson's Estate, Herring v Barrow* (1880) 14 ChD 263, CA, that the donee had only a right to enjoyment in specie). See also *Bradley v Westcott* (1807) 13 Ves 445.

8 *Re Thomson's Estate, Herring v Barrow* (1880) 14 ChD 263, CA. See also *Pennock v Pennock* (1871) LR 13 Eq 144; *Re Rowland, Jones v Rowland* (1902) 86 LT 78 (as to the £400 see PARA 659 note 18 ante); *Rosenburg v Scraggs* (1900) 19 NZLR 196; *Yates v Yates* (1905) 25 NZLR 263.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(iii) Estates Tail/668. Estates tail before 1926.

(iii) Estates Tail

668. Estates tail before 1926.

Before 1 January 1926¹ an estate tail could exist in real estate only; it could be created by will by the same words which were effective for this purpose in a deed, namely by the words heirs 'of the body' or other words expressly or impliedly denoting heirs issuing from the body of the donee, or by the expression 'in tail' which was allowed as an alternative by statute². In a will, however, greater latitude was allowed than in a deed, and an estate tail might also be created by words, such as 'sons' or 'issue', indicating descent from the body of the donee³. Accordingly, a devise by the owner in fee simple to the donee and his 'heirs male', or to him and his 'heirs female'⁴, or to him and his 'heirs lawfully begotten'⁵, formerly created an estate in fee tail special (male or female), or general, respectively⁶; and many words descriptive of descendants were capable in a will of being words of limitation. Thus 'first and every other son' or 'children' might be taken as words of limitation if it was necessary to give them that construction in order to give effect to the testator's intention⁷, although ordinarily speaking they were words of purchase⁸; and similarly in the case of 'son', 'eldest son'⁹, 'eldest male issue'¹⁰ or 'family'¹¹. 'Issue'¹², 'descendants'¹³ and 'posterity'¹⁴ were more easily susceptible of such a meaning. If such words included not only persons who were heirs by lineal descent but also persons who could only be collateral heirs, the estate was a fee simple; but if they comprised only persons who were heirs by lineal descent, the estate taken was an estate tail¹⁵, the stock of descent being chosen so as to include all the members of the family intended to take¹⁶.

1 For the rule where the testator's death occurs after 31 December 1925 see PARA 671 post.

2 See REAL PROPERTY vol 39(2) (Reissue) PARAS 119-120. For the rule in *Mandeville's Case* (1328) Co Litt 26b (limitation to the heirs of the body of a deceased person created an estate tail) see REAL PROPERTY vol 39(2) (Reissue) PARA 120. That rule did not apply if the limitation was to heirs general, not special: *Moore v Simkin* (1885) 31 ChD 95.

3 See the text and notes 4-16 infra; and PARA 411 ante. Initial words might be only introductory to the effective limitations which followed, as in *Re Lord Lawrence, Lawrence v Lawrence* [1915] 1 Ch 129, CA, and *Re Elton, Elton v Elton* [1917] 2 Ch 413 (where the initial words of the devise were in each case suggestions of an estate tail, but were held to be merely introductory to later words which conferred life estates, and, therefore, did not govern those later words). As to the circumstances in which an estate tail might be implied see PARA 760 post.

4 Co Litt 27a; *Anon* (1535) YB 27 Hen 8 fo 27 pl 11; *Baker v Wall* (1697) 1 Ld Raym 185. See also *Blaxton v Stone* (1687) 3 Mod Rep 123; *Lord Ossulston's Case* (1708) 3 Salk 336; *Doe d Earl of Lindsey v Colyear* (1809) 11 East 548; *Doe d Tremewen v Permewen* (1840) 11 Ad & El 431 at 436 (to A and his heir male living to attain 21); *Doe d Angell v Angell* (1846) 9 QB 328; *Good v Good* (1857) 7 E & B 295 at 300 per Lord Campbell CJ. See also *Crumpe v Crumpe* [1900] AC 127, HL (where an intention to create an estate tail was assumed); *Silcocks v Silcocks* [1916] 2 Ch 161. Cf *Re Howarth, Macqueen v Kirby* (1916) 60 Sol Jo 307 (where, under a direction for settlement to A for life and his 'heirs male in tail in the usual way', A took only an estate for life). See also *Tufnell v Borrell* (1875) LR 20 Eq 194 (where a devise to all 'my grandchildren, their heirs male and the heirs male of the survivors and survivor of them' created joint tenancies in the grandchildren for lives with inheritances in tail and cross-remainders in tail).

5 Co Litt 20b; *Turke v Frencham* (1559) 2 Dyer 171a; *Pierson v Vickers* (1804) 5 East 548; *Nanfan v Legh* (1816) 7 Taunt 85; *Good v Good* (1857) 7 E & B 295 at 300 per Lord Campbell CJ. See also *Beresford's Case* (1607) 7 Co Rep 41a. In a devise to A and his 'lawful heirs', prima facie the word 'lawful' did not restrict the sense of the words: *Mathews v Gardiner* (1853) 17 Beav 254 at 257. See also *Simpson v Ashworth* (1843) 6 Beav 412 at 416.

6 See the cases cited in notes 4-5 supra. The addition of 'for ever' did not enlarge the estate tail to an estate in fee simple: *Vernon v Wright* (1858) 7 HL Cas 35. In a gift to a child and his heirs, 'male taking before female', these words only indicated the course of descent, and the child had an estate in fee simple: *Finucane v Daly* [1919] 1 IR 284.

7 For the rule in *Wild's Case* (1599) 6 Co Rep 16b, where there was a devise of real estate to a person, who had no child, 'and his children' see PARA 673 post. For the rule in *Shelley's Case* (1581) 1 Co Rep 93b (abolished by statute in relation to wills taking effect after 31 December 1925) see *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658, HL; and REAL PROPERTY vol 39(2) (Reissue) PARA 172. In *Re Hammond, Parry v Hammond* [1924] 2 Ch 276, *Bowen v Lewis* (1884) 9 App Cas 890 (where Lord Cairns said at 905 that it was clear that, under a gift to children with words of division or inheritance, they took as purchasers), *Coles v Witt* (1856) 2 Jur NS 1226, and *Voller v Carter* (1854) 4 E & B 173, estates tail were created by the particular devises contained in the wills under consideration, those in the last two cases cited being prior to the Wills Act 1837. The gift might be explained by a subsequent gift over on default of issue generally (*Wight v Leigh* (1809) 15 Ves 564; *Herbert v Blunden* (1837) 1 Dr & Wal 78; *Re Childe* [1883] WN 48, explained in *Re Pennefather*, *Savile v Savile* [1896] 1 IR 249 at 262), or even by a gift over on default of some particular kind of issue, or of issue restricted in some manner (*Foord v Foord* (1730) 3 Bro Parl Cas 124 (without sons); *Wyld v Lewis* (1738) 1 Atk 432 at 434; *Robinson v Hicks* (1758) 3 Bro Parl Cas 180 (without such issue); *Doe d Jones v Davies* (1832) 4 B & Ad 43; *Lewis v Puxley* (1847) 16 M & W 733). There was no rule of construction governing when such words were words of limitation (*East v Twyford* (1851) 9 Hare 713 at 730 per Turner V-C; affd (1853) 4 HL Cas 517), and in all these cases the testator's intention was to be gathered from the whole will and governed the meaning and effect of the gift (*Mandeville v Carrick* (1795) 3 Ridg Parl Rep 352 at 365).

8 *Doe d Phipps v Lord Mulgrave* (1793) 5 Term Rep 320 at 323 per Lord Kenyon CJ; adopted in *Earl Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 at 624 per Lord Campbell CJ. See also *Doe d Burin v Charlton* (1840) 1 Man & G 429; *Malcolm v Malcolm* (1856) 21 Beav 225; *Bennett v Bennett* (1864) 2 Drew & Sm 266; *Re Bishop and Richardson's Contract* [1899] 1 IR 71.

9 *Bifield's Case* (1600), cited in 1 Vent 231 per Lord Hale; *Sonday's Case* (1611) 9 Co Rep 127b; *Robinson v Robinson* (1756) 1 Burr 38 (affd sub nom *Robinson v Hicks* (1758) 3 Bro Parl Cas 180); *Lewis v Puxley* (1847) 16 M & W 733. See also *Mellish v Mellish* (1824) 2 B & C 520 (property 'to go to daughter C as follows; if she had a son, to that son'; C took estate in tail male); *Forsbrook v Forsbrook* (1867) 3 Ch App 93. As to gifts over on death without 'children' see PARA 747 post.

10 *Re Finlay's Estate* [1913] 1 IR 143 (distinguishing the cases cited in PARA 624 note 5 ante). Cf *Re Hobbs*, *Hobbs v Hobbs* [1917] 1 Ch 569, CA.

11 *Lucas v Goldsmid* (1861) 29 Beav 657; *W Gardiner & Co Ltd v Dessaix* [1915] AC 1096, PC (where, under 'family', children took absolute interests; and see *Wright v Atkyns* (1814) Coop G 111 at 122-123); *Re Taylor, Shaw v Shaw* [1914] 1 IR 111 (devise of leaseholds to A for life and at her death to descend to her next of kin; life interest only in A); *Gray v Gray* [1915] 1 IR 261 (where a leasehold farm went under 'aires' to the next of kin leaving children or descendants).

12 *Harvey v Towell* (1847) 7 Hare 231 (personal estate); *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 211, 225. See also PARA 624 ante.

13 *Bird v Webster* (1853) 1 Drew 338 at 340; *Re Sleeman, Cragoe v Goodman* [1929] WN 16 (devise to daughter and her descendants; estate tail).

14 *A-G v Bamfield* (1703) Freem Ch 268; *Young v Davies* (1863) 2 Drew & Sm 167 at 172 (to 'my surviving daughters and their lawful offspring'). Cf *Shannon v Good* (1884) 15 LR Ir 284 at 298, Ir CA. See also REAL PROPERTY vol 39(2) (Reissue) PARA 172.

15 Co Litt 9b.

16 *Doe d Gallini v Gallini* (1833) 5 B & Ad 621 at 642; affd (1835) 3 Ad & El 340 at 353, Ex Ch (approved in *Forsbrook v Forsbrook* (1867) 3 Ch App 93 at 98).

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669. Quasi-inheritable gifts of personal estate.

Before 1 January 1926¹ a disposition by will of personal estate by words which showed an intention to give an inheritable estate in it to a donee gave him an absolute interest². Thus a donee took an absolute interest under a bequest of personal estate to him and 'his heirs'³, or to him and the 'heirs of his body'⁴, or to him and the 'heirs male of his body'⁵, or by virtue of other expressions showing an intention that his issue throughout the whole of their line should take after him by descent⁶. The intention might be inferred by implication from a gift over on failure of his heirs of the body or failure of his issue generally⁷.

This rule of construction was applied even in cases where the donee himself was expressly given only a life estate⁸ and the inheritable interest arose by virtue of, or by analogy to, the application of the rule in *Shelley's Case*⁹, in spite of the fact that the rule in *Shelley's Case* was not strictly applicable to personal estate¹⁰.

1 As to estates tail since 31 December 1925 see PARA 671 post.

2 *Re Hope's Will Trust* [1929] 2 Ch 136 at 141. The rule was often stated in the form 'words which create an estate tail in realty will give an absolute interest in personalty': see *Tothill v Pitt* (1766) 1 Madd 488 at 509 per Sewell MR; *Elton v Eason* (1812) 19 Ves 73 at 78 per Grant MR; *Heron v Stokes* (1842) 2 Dr & War 89 at 106; *Audsley v Horn* (1859) 1 De GF & J 226 at 236; *Williams v Lewis* (1859) 6 HL Cas 1013 at 1020 per Lord Cottenham LC; *Re Lowman, Devenish v Pester* [1895] 2 Ch 348 at 361, CA. The rule was not to be applied too rigidly in every case, for it might contradict the rule in *Forth v Chapman* (1720) 1 P Wms 663 (see PARA 670 text and note 5 post); *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276 at 280.

3 *Anstruther v Chalmers* (1826) 2 Sim 1; *Re Banks' Trusts, ex p Hovill* (1855) 2 K & J 387. See also *Bigge v Bensley* (1783) 1 Bro CC 187. In these cases there was a preliminary question whether, regard being had to the whole will and considering that the property was personal and not real estate, the words were used in their usual sense as meaning persons to take in succession: *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276 at 280 per Wood V-C. On a consideration of the whole will it might appear that the words 'heirs of the body', and the like, described particular persons: see eg *Dakin v Nicholson* (1837) 6 LJ Ch 329; and PARA 629 ante. The question in the first place, therefore, was not whether the testator intended the donee to have an absolute interest or not (cf *Garth v Baldwin* (1755) 2 Ves Sen 646 at 661 per Lord Hardwicke LC ('it is a limitation of personal estate to one for life and the heirs of his body; which vests absolutely, whether so intended by the testator or not')), but whether the words 'heirs' etc were used in a sense different from their usual sense.

4 *Whitmore v Weld* (1685) 1 Vern 326 at 347; *Garth v Baldwin* (1755) 2 Ves Sen 646; *Crooke v De Vandes* (1803) 9 Ves 197; *Crawford v Trotter* (1819) 4 Madd 361; *Widdison v Hodgkin* (1823) 2 LJOS Ch 9 ('heirs', meaning in the context 'heirs of the body'). See also *A-G v Hird* (1782) 1 Bro CC 170; *Wilkinson v South* (1798) 7 Term Rep 555 at 557.

5 *Leventhorpe v Ashbie* (1635) 1 Roll Abr 831 pl 1; Tudor, LC Real Prop (4th Edn) 382; *Seale v Seale* (1715) 1 P Wms 290. See also *Bennet v Lewknor* (1616) 1 Roll Rep 356 (to A and his heirs male). Cf *Doncaster v Doncaster* (1856) 3 K & J 26 (a gift in a settlement); and see SETTLEMENTS vol 42 (Reissue) PARA 938.

6 *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 206; *Re Barker's Trusts* (1883) 48 LT 573. See, accordingly, *Earl Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 ('to my brother Lord J B, and to his children in succession'). See also *Britton v Twining* (1817) 3 Mer 176 (to A during his life, and 'after his decease to the heir male of his body, and so on in succession to the heir-at-law, male or female'); *Re Commercial Railway Act, ex p Harrison* (1838) 3 Y & C Ex 275; *Beaver v Nowell* (1845) 25 Beav 551; *Young v Davies* (1863) 2 Drew & Sm 167 ('to my surviving daughters and their lawful offspring'); *Atkinson v l'Estrange* (1885) 15 LR 340 (to A for life and to her heirs after her). As to gifts to a person and his children see further PARAS 673-674 post.

7 *Chandless v Price* (1796) 3 Ves 99; *Campbell v Harding* (1831) 2 Russ & M 390 at 401-402 (affd sub nom *Candy v Campbell* (1834) 8 Bli NS 469 at 491, HL). See also *Dunk v Fenner* (1831) 2 Russ & M 557; *Simmons v Simmons* (1836) 8 Sim 22; *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 208; *Webster v Parr* (1858) 26 Beav 236; *Re Andrew's Will* (1859), as reported in 29 LJ Ch 291 at 292 (where Romilly MR said that the rule was analogous to the *cy-près* doctrine (see PARAS 521 ante, 675 post) applicable to similar gifts of

realty); *Re Sallery* (1861) 11 I Ch R 236. In earlier cases the rule that the interest was to be construed as an absolute interest had been held not to apply where the words used would, as to freeholds, create an estate tail by implication only: *Atkinson v Hutchinson* (1734) 3 P Wms 258; *Doe v Lyde* (1787) 1 Term Rep 593 at 596. See also *Knight v Ellis* (1789) 2 Bro CC 570 at 578. Where the rule applied, a gift over after failure of issue was void, but, if the failure of issue was restricted to the time of the death of the first taker, the implication corresponding to an estate tail did not arise; the first taker, unless the limitation was to him for life only, took absolutely in the first instance, but subject to a valid executory gift over if he died without leaving issue: *Campbell v Harding* supra at 401-402. As to the restricted construction of references to death without issue in wills after 31 December 1837 see PARAS 740, 744 post.

8 *Garth v Baldwin* (1755) 2 Ves Sen 646; *Earl of Chatham v Tothill* (1771) 7 Bro Parl Cas 453; *Britton v Twining* (1817) 3 Mer 176; *Atkinson v l'Estrange* (1885) 15 LR Ir 340; *Re Score, Tolman v Score* (1887) 57 LT 40. Cf *Theebridge v Kilburne* (1751) 2 Ves Sen 233; *Turner v Turner* (1783) 1 Bro CC 316.

9 In the following cases limitations of personal estate took effect as if the rule in *Shelley's Case* (1581) 1 Co Rep 93b (now abolished in relation to instruments coming into operation after 31 December 1925: see PARA 624 note 7 ante) applied to them: *Richards v Lady Bergavenny* (1695) 2 Vern 324; *Stratton v Payne* (1726) 3 Bro Parl Cas 99; *Butterfield v Butterfield* (1748) 1 Ves Sen 133; *Glover v Strothoff* (1786) 2 Bro CC 33; *Robinson v Fitzherbert* (1786) 2 Bro CC 127; *Kinch v Ward* (1825) 2 Sim & St 409; *Earl of Verulam v Bathurst* (1843) 13 Sim 374; *Douglas v Congreve* (1838) 1 Beav 59; *Harvey v Towell* (1847) 7 Hare 231 at 234 (applying the argument of Fearn's Contingent Remainders (7th Edn) 190); *Ousby v Harvey* (1848) 17 LJ Ch 160; *Williams v Lewis* (1859) 6 HL Cas 1013; *Comfort v Brown* (1878) 10 ChD 146; *Re Score, Tolman v Score* (1887) 57 LT 40. In the following cases personalty was settled by reference to realty, to the limitations of which the rule in *Shelley's Case* supra was applicable: *Brouncker v Bagot* (1816) 1 Mer 271; *Tate v Clarke* (1838) 1 Beav 100. See also the other cases cited in note 8 supra.

10 Cf *Re McElligott, Grant v McElligott* [1944] 1 Ch 216, [1944] 1 All ER 441; and see REAL PROPERTY vol 39(2) (Reissue) PARA 106. The rule was not applied if the result would be to defeat entirely the testator's intention appearing from the whole will and capable, without violation of the rules of law, of being carried into effect: *Audsley v Horn* (1859) 1 De GF & J 226 at 236 per Lord Campbell LC; *Dodds v Dodds* (1860) 11 I Ch R 374. For example, 'heirs' might describe particular persons intended to take by purchase: *Sands v Dixwell* (1738), cited in 2 Ves Sen at 652, 661 (reported sub nom *Roberts v Dixwell* 1 Atk 607 (real estate)); *Hodgeson v Bussey* (1740) 2 Atk 89; *Wilson v Vansittart* (1770) Amb 562; *Britton v Twining* (1817) 3 Mer 176 at 182 per Grant MR; *Symers v Jobson* (1848) 16 Sim 267; *Bull v Comberbach* (1858) 25 Beav 540 at 543. If the gift was to the donee for his life and then to his issue, prima facie the donee took for life only, and the issue took on his death: *Knight v Ellis* (1789) 2 Bro CC 570, followed in *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 209, 222; *Goldney v Crabb* (1854) 19 Beav 338; *Waldron v Boulter* (1856) 22 Beav 284; *Jackson v Calvert* (1860) 1 John & H 235; *Bannister v Lang* (1867) 17 LT 137; *Foster v Wybrants* (1874) IR 11 Eq 40; *Re Cullen's Estate* [1907] 1 IR 73. In such a gift of blended real and personal estate the donee might take an estate tail in the real estate, and a life interest in the personal estate: *Jackson v Calvert* supra; *Re Longworth, Longworth v Campbell* [1910] 1 IR 23.

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670. Gifts by reference to limitations of real estate.

Before 1 January 1926¹, where real and personal estate were blended together in one gift, or where the personal estate was directed to be enjoyed with the real estate, and the limitations in each case were framed in the usual technical terms creating successive estates tail in respect of real estate, the personal estate went to the person having the first vested estate tail in the real estate², subject to being defeated by a donee under a prior estate tail coming into existence and taking a vested interest³. This was not a necessary result where, for example, in a will made before 1 January 1838, the estate tail as to the real estate was created by implication from a gift over on failure of issue⁴, which as to the personal estate might be construed to mean a failure of issue at the death of the first taker⁵.

¹ As to estates tail after 31 December 1925 see PARA 671 post.

2 *Foley v Burnell* (1783) 1 Bro CC 274; *Vaughan v Burslem* (1790) 3 Bro CC 101; *Fordyce v Ford* (1795) 2 Ves 536; *Re Johnson's Trusts* (1866) LR 2 Eq 716. See also *Re Hobbs, Hobbs v Hobbs* [1917] 1 Ch 569, CA; *Re Loughhead, Hamilton v Loughhead* [1918] 1 IR 227; PERSONAL PROPERTY vol 35 (Reissue) PARAS 1229-1230; SETTLEMENTS vol 42 (Reissue) PARA 938.

3 *Re Lowman, Devenish v Pester* [1895] 2 Ch 348, CA.

4 As to the restricted statutory construction of references to death without issue in wills after 31 December 1837 see PARA 740 et seq post; and as to the creation of an estate tail by implication where the restricted construction does not apply see PARA 760 post.

5 *Forth v Chapman* (1720) 1 P Wms 663; Tudor LC Real Prop (4th Edn) 371; *Atkinson v Hutchinson* (1734) 3 P Wms 258 at 260-261. The reason was that the implication in favour of the issue drawn from such a gift over could not be supposed to exist in the case of personal property, since they could not by any construction take under such an implied gift: *Forth v Chapman* supra at 667 per Lord Parker LC; but see *Re Andrew's Will* (1859) 27 Beav 608. This explanation was not in fact required where the gift was of personalty alone: see *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 208; and PARA 669 ante.

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671. Estates tail after 1925.

Between 1 January 1926 and 31 December 1996 inclusive it was possible to create an entailed interest in any property, real or personal, but only by way of trust¹, and only by the like expressions as those by which before 1 January 1926 a similar estate could have been created by deed, not being an executory instrument². Informal expressions occurring in a will coming into operation between 1 January 1926 and 31 December 1996 inclusive which formerly would have created an estate tail no longer had that effect, but operated in equity to create absolute, fee simple or other interests corresponding to the interests which would before 1 January 1926 have been created by similar expressions in regard to personal estate³.

Although, in order to create an entailed interest by will, it was thus necessary to use the same expressions as were required for that purpose in a deed, it was not essential to use the words 'heirs of the body'; 'heirs'⁴ alone was sufficient if on the construction of the will it meant 'heirs of the body'⁵. Thus while a devise to a person and his heirs usually gave a fee simple⁶, the context may have shown that by heirs was meant 'heirs of the body'⁷, so that an entailed interest only was created; and a devise over on the donee's death without heirs of his body⁸ may have had the effect of reducing the fee simple to an entailed interest⁹. In such cases, as the gift in the will was, on its construction, to the heirs of the body, it seems that an entailed interest will still have been created.

Clauses reducing estates tail to life interests in the case of persons born in the testator's lifetime fall to be construed with some strictness¹⁰.

Where a person purports by an instrument coming into operation on or after 1 January 1997 to grant to another person an entailed interest in real or personal property, the instrument is not effective to grant an entailed interest but operates instead as a declaration that the property is held in trust absolutely for the person to whom an entailed interest in the property was purportedly granted¹¹. Entailed interests created before 1 January 1997 will continue until barred or the property is disposed of¹².

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 46; SETTLEMENTS vol 42 (Reissue) PARA 939.

2 See the Law of Property Act 1925 s 130(1) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and REAL PROPERTY vol 39(2) (Reissue) PARA 119. An entailed interest cannot be created by an instrument coming into operation on or after 1 January 1997: see the text and note 11 infra.

3 See the Law of Property Act 1925 s 130(2) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4); and PARAS 674-675 post. As to an estate tail conferred by implication see PARA 760 post.

4 'Heirs' might before 1 January 1926, and may before 1 January 1997 to a more restricted extent, be a word of limitation, ie a word defining the quantity of interest which a donee previously mentioned takes (*Harvey v Towell* (1847) 7 Hare 231 at 234), or the word may be a word of purchase, ie it may be descriptive of persons who are themselves to take as donees. As to the use of 'heir' now to confer an equitable interest by purchase, and as to the saving of certain enactments for the purpose of ascertaining the devolution of entailed interests and persons taking as heirs by purchase see PARA 628 note 1 ante.

5 Cf para 668 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 120.

6 This might be assisted by the rule in *Shelley's Case* (1581) 1 Co Rep 93b (now abolished: see PARA 669 ante): *Re Norrington, Norrington v Norrington* (1923) 40 TLR 96; *Re Hack, Beadman v Beadman* [1925] Ch 633. However, a word defining the interest the heir was to take gave him a separate interest and made him a new stock of descent: *Re Hussey and Green's Contract, Re Hussey, Hussey v Simper* [1921] 1 Ch 566.

7 Co Litt 21b; *Cowper v Scott* (1731) 3 P Wms 119 at 122 per Jekyll MR; *Roe d James v Avis* (1792) 4 Term Rep 605; *Doe d Jearrad v Bannister* (1840) 10 LJ Ex 33; *Biddulph v Lees* (1859) 28 LJQB 211 at 213, Ex Ch (clause showing that there is some ulterior estate to be taken under the will by way of remainder); *Re Thompson, ex p Thompson* (1864) 16 I Ch R 228, Ir CA ('always to go in the male line'); *O'Hanlon v Unthank* (1872) IR 7 Eq 68 ('heirs being issue').

8 *Wallop v Darby* (1612) Yelv 209; *Jenkins v Herries* (1819) 4 Madd 67; *Jenkins v Hughes* (1860) 8 HL Cas 571. See PARA 760 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 120. It seems that a gift over on failure of issue may have had the same effect where it could be construed as importing an indefinite failure of issue (see PARA 760 post); but as to the construction of references to failure of issue see PARA 740 et seq post.

9 A devise over on default of heirs had the like effect of cutting down the fee simple to an estate tail, if the devisee over was the right heir of the testator, and the first devisee was the testator's child, as, unless the first devise was restricted to an estate tail, the devise over could not take effect (*Nottingham v Jennings* (1700) 1 P Wms 23, 1 Ld Raym 568, Willes 166n; Fearn's Contingent Remainders (10th Edn) 467); and, similarly, if the devisee over was capable of being a collateral heir of the first devisee (*Tyte v Willis* (1733) Cas temp Talb 1; *Pickering v Towers* (1758) Amb 363; *Morgan v Griffiths* (1775) 1 Cowp 234; *Doe d Bean v Halley* (1798) 8 Term Rep 5 at 10; *Doe d Hatch v Bluck* (1816) 6 Taunt 485; *Simpson v Ashworth* (1843) 6 Beav 412; *Hancock v Clavey* (1871) 25 LT 323; Fearn's Contingent Remainders (10th Edn) 466 (Butler note (i)); *Ernst v Zwicker* (1897) 27 SCR 594; *Re McDonald* (1903) 6 OLR 478), or the event on which the gift over was made was necessarily dependent on the existence of a collateral heir (see *Re Waugh, Waugh v Cripps* [1903] 1 Ch 744 at 747). In *Harris v Davis* (1844) 1 Coll 416 at 423, the rule was applied where some, but not all, of the devisees were capable of being collateral heirs. The rule was confined to these cases: see *A-G v Gill* (1726) 2 P Wms 369 (devise over to a charity); *Preston d Eagle v Funnell* (1739) Willes 164 (testator's nearest of kindred, who were not necessarily capable of inheriting from the donee, his son); *Tilburgh v Barbut* (1748) 1 Ves Sen 89 (devise over to first devisee's half brother, who could not at that time inherit). In *Jenkins v Hughes* (1860) 8 HL Cas 571, the context showed that the 'heir' took an estate tail: see SETTLEMENTS vol 42 (Reissue) PARA 938. The appointment or acknowledgment of a person as the testator's heir, although he is not the real heir, may give him an inheritable estate: *Parker v Nickson* (1863) 1 De GJ & Sm 177 at 183. As to gifts of real estate to a person and his 'executors' etc see PARA 660 note 1 ante; and as to the appointment of a residuary legatee see PARA 589 ante.

10 *Re Caldwell's Will Trusts, Jenyns v Sackville West* [1971] 1 All ER 780, [1971] 1 WLR 181.

11 Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5(1). See also REAL PROPERTY vol 39(2) (Reissue) PARA 141.

12 Ie under the Law of Property Act 1925 s 176: see REAL PROPERTY vol 39(2) (Reissue) PARA 141.

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672. Accessory gift of chattels to go with realty.

If a bequest of chattels is accessory to a devise of real estate, and the devise is rendered inoperative by the testator's voluntary act, for example by a voluntary deed settling the land to uses in his lifetime but after the date of his will, it is a question of construction of the bequest whether the chattels are to go with the land as settled by the deeds or whether the bequest stands; but the bequest is not necessarily revoked merely because the devise has been rendered inoperative¹. If, however, revocation of the devise has been effected by codicil, an alteration of the trusts of the bequest is more likely to be inferred².

1 *Re Whitburn, Whitburn v Christie* [1923] 1 Ch 332 (applying *Darley v Langworthy* (1774) 3 Bro Parl Cas 359). Cf *Martineau v Briggs* (1875) 23 WR 889, HL (alteration of freehold devise by codicil but no corresponding alteration of bequest of leaseholds).

2 *Re Towry's Settled Estates, Dallas v Towry* (1889) 41 ChD 64; *Re Whitburn, Whitburn v Christie* [1923] 1 Ch 332 at 338.

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(iv) Gifts to a Person and his Children or Issue

673. Devise to person and his children.

Before 1 January 1926¹, in a gift to a donee 'and his children'², whether 'and his children' were construed as words of limitation, or as words of description of persons to take either concurrently with or in succession to the named donee³, or in substitution for him⁴, was determined by the rule in *Wild's Case*⁵. This rule, which is not applicable to wills coming into operation after 31 December 1925, was that, in an immediate devise of real estate to a person and his children, prima facie 'children', if the donee had no child at the date of the will⁶, was taken to be a word of limitation and the named person had an estate tail⁷. The context might show, however, that the unborn children were to take as purchasers⁸. If, however, he had a child or children at the time of the devise, the will was prima facie construed as giving a joint estate to him and his children as purchasers⁹; even here, however, the context might show that 'children' was a word of limitation and that an estate tail was intended¹⁰, or that the children took in succession to their parents and as purchasers¹¹. It seems that, for the purposes of the rule, an only child en ventre sa mère was not regarded as in existence¹². The rule applied only where the testator had not sufficiently indicated his intention¹³, and the court always considered itself at liberty to disregard the rule in both its branches where an adherence to it would have defeated the testator's intention as collected from other passages of his will¹⁴.

1 The effect of the rule in *Wild's Case* (1599) 6 Co Rep 16b was abrogated in relation to devises in wills coming into operation after 31 December 1925 by virtue of the Law of Property Act 1925 s 130(1), (2) (repealed). It is not possible to create entailed interests by instruments coming into operation on or after 1 January 1997: see PARA 671 ante.

2 As to gifts to a donee and his issue see PARA 675 post.

3 *Lampley v Blower* (1746) 3 Atk 396 at 397 per Lord Hardwicke LC.

4 See PARA 612 ante.

5 *Wild's Case* (1599) 6 Co Rep 16b at 17a.

6 *Seale v Barter* (1801) 2 Bos & P 485; *Clifford v Koe* (1880) 5 App Cas 447 at 453, 463, 469, 471, HL. The Wills Act 1837 did not affect the rule in this respect: *Grieve v Grieve* (1867) 36 LJ Ch 932 at 933.

7 *Wild's Case* (1599) 6 Co Rep 16b at 17a (as stated in *Byng v Byng* (1862) 10 HL Cas 171 at 178 per Lord Cranworth LC); *Sweetapple v Bindon* (1705) 2 Vern 536; *Cook v Cook* (1706) 2 Vern 545; *Wharton v Gresham* (1776) 2 Wm Bl 1083 (where 'to A and his sons in tail male' gave A an estate tail); *Campbell v Bouskell* (1859) 27 Beav 325; *Underhill v Roden* (1876) 2 ChD 494 at 499. Cf *Stevens v Lawton* (1588) Cro Eliz 121; *Trevor v Trevor* (1847) 1 HL Cas 239 (a case of executory trust where the issue took as purchasers). The rule in *Wild's Case* supra was inapplicable unless the interests of the parent and children were both concurrent. Thus it did not apply to gifts to the parent for life and after his death to his children: *Chandler v Gibson* (1901) 2 OLR 442; *Grant v Fuller* (1902) 33 SCR 34 at 37; *Re Sharon and Stuart* (1906) 12 OLR 605 at 609-610. See also *Broadhurst v Morris* (1831) 2 B & Ad 1. As to the interest now created see PARA 675 post.

8 *Re Moyles' Estate* (1878) 1 LR Ir 155, Ir CA (words of limitation applying to children's interest). The addition of words of limitation did not affect the rule where they could be read as referring to the first donee himself and as describing his interest: *Wharton v Gresham* (1776) 2 Wm Bl 1083; *Cormack v Copous* (1853) 17 Beav 397 at 401. As to the application of the rule see also *Seale v Barter* (1801) 2 Bos & P 485; *Clifford v Koe* (1880) 5 App Cas 447 at 457-458, 469, HL. Where there was a devise to a named person and after his decease to his children, even though he had no children at the time of the devise, every child whom he had might take under the limitation by way of remainder: *Wild's Case* (1599) 6 Co Rep 16b; *Ginger d White v White* (1742) Willes 348 ('to the children of J successively . . . and to their heirs'); *Doe d Liversage v Vaughan* (1822) 5 B & Ald 464.

9 *Wild's Case* (1599) 6 Co Rep 16b; *Oates d Hatterley v Jackson* (1742) 2 Stra 1172.

10 *Wood v Baron* (1801) 1 East 259; *Webb v Byng* (1856) 2 K & J 669 at 673 (affd sub nom *Byng v Byng* (1862) 10 HL Cas 171 at 181-182) (inferences against joint estate drawn from name and arms clause and the fact that heirlooms would be enjoyed jointly if joint estate conferred); *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 at 624 ('children in succession'); *Ward v Ward* [1921] 1 IR 117, Ir CA (devise to J 'with remainder to her and her children for ever'; 'children' was a word of limitation, and J took an estate tail general).

11 *Jeffery v Honywood* (1819) 4 Madd 398 (where words of limitation were added to the limitation to the issue); *Bowen v Scowcroft* (1837) 2 Y & C Ex 640 at 661. See also *Webb v Byng* (1856) 2 K & J 669.

12 *Roper v Roper* (1867) LR 3 CP 32; and see PARA 647 ante.

13 *Re Jones, Lewis v Lewis* [1910] 1 Ch 167 at 175 per Joyce J; *Re Buckmaster's Estate* (1882) 47 LT 514.

14 *Byng v Byng* (1862) 10 HL Cas 171 at 178 per Lord Cranworth LC; *Clifford v Koe* (1880) 5 App Cas 447 at 453, HL, per Lord Selborne LC, and at 471 per Lord Watson. As to the exclusion of the rule in a gift of furniture with real estate see *Grieve v Grieve* (1867) LR 4 Eq 180 (doubted in *Clifford v Koe* supra at 461-462).

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674. Bequest to a person and his children.

The rule in *Wild's Case*¹ had strictly no application to personal estate², and, if in a bequest to a named person and his children 'children' was used as a word of limitation, the named person took, and still takes, an absolute interest³. In general, the word is not one of limitation⁴, and under such a bequest prima facie the parent and the children take concurrently⁵, as joint tenants⁶. The context may, however, point to a different conclusion⁷, and slight circumstances have been sufficient to enable the court⁸ to come to the conclusion that a gift for life to the named person and after his death to his children was intended⁹. The interests are presumed to be successive where all the children of the donee, whether born before or after the testator's death, are intended to take¹⁰, or where there is a gift over on failure of issue of the parent or other provision showing that the property is contemplated as still subsisting undivided at the parent's death¹¹, or otherwise inconsistent with the parent taking an interest in the capital together with the children¹².

1 See *Wild's Case* (1599) 6 Co Rep 16b at 17a; and PARA 673 ante.

2 *Audsley v Horn* (1859) 1 De GF & J 226 at 236 per Lord Campbell LC (where, however, a gift over assisted the construction of the gift as creating successive interests); *Re Jones, Lewis v Lewis* [1910] 1 Ch 167. See also the opinions expressed in *Stokes v Heron* (1845) 12 Cl & Fin 161 at 183, 198, HL.

3 *Doe d Gigg v Bradley* (1812) 16 East 399 (where a later child existed at the date of the will); *Cape v Cape* (1837) 2 Y & C Ex 543.

4 *Buffar v Bradford* (1741) 2 Atk 220.

5 *Alcock v Ellen* (1692) Freem Ch 186; *Buffar v Bradford* (1741) 2 Atk 220; *Pyne v Franklin* (1832) 5 Sim 458; *De Witte v De Witte* (1840) 11 Sim 41; *Sutton v Torre* (1842) 6 Jur 234 (cf *Cator v Cator* (1851) 14 Beav 463 on the same will); *Beales v Crisford* (1843) 13 Sim 592 (B and 'his family' construed to mean 'children'); *Bustard v Saunders* (1843) 7 Beav 92; *Mason v Clarke* (1853) 17 Beav 126; *Newill v Newill* (1872) 7 Ch App 253. See also *Jubber v Jubber* (1839) 9 Sim 503; *Salmon v Tidmarsh* (1859) 5 Jur NS 1380 (where the children took at 21); *Re Sproule, Chambers v Chambers* (1915) 49 ILT 96; *Re Astbury, Astbury v Godson* [1926] WN 336. The class of children is ascertained according to the usual rules (see PARA 593 et seq ante), and, therefore, no child born after the death of the testator, in the case of an immediate gift, can be let in (*De Witte v De Witte* supra); but in the case of a postponed gift after-born children may be let in (*Cook v Cook* (1706) 2 Vern 545; *Read v Willis* (1844) 1 Coll 86; *Lenden v Blackmore* (1840) 10 Sim 626; but see *Scott v Scott* (1845) 15 Sim 47).

6 See the cases cited in note 5 supra. The context showed that the donees took as tenants in common in *Eccard v Brooke* (1790) 2 Cox Eq Cas 213; *Lenden v Blackmore* (1840) 10 Sim 626; *Paine v Wagner* (1841) 12 Sim 184; *Cunningham v Murray* (1847) 1 De G & Sm 366 (on appeal on another point (1848) 17 LJ Ch 407); *Salmon v Tidmarsh* (1859) 5 Jur NS 1380.

7 *Caffary v Caffary* (1844) 8 Jur 329 (subsequent gift showing that parent took absolutely). The fact that the gift is to the testator's wife and his children does not exclude the ordinary rule that they take concurrently: *Newill v Newill* (1872) 7 Ch App 253 at 259. Cf *Re Seyton, Seyton v Satterthwaite* (1887) 34 ChD 511; *Re Davies' Policy Trusts* [1892] 1 Ch 90 (not following *Re Adam's Policy Trusts* (1883) 23 ChD 525). In a gift to a person, his wife and children, the rule applies, although formerly this was subject to the rule as to the effect of gifts to a person and his wife with other persons: *Gordon v Whieldon* (1848) 11 Beav 170; and see PARA 677 post. Formerly, when the gift was to a married woman for her separate use and her children, a succession of interests was indicated, for otherwise the separate use could not be applied to the whole fund: *French v French* (1840) 11 Sim 257; *Bain v Lescher* (1840) 11 Sim 397; *Froggatt v Wardell* (1850) 3 De G & Sm 685; *Jeffery v De Vitre* (1857) 24 Beav 296. Cf *Re Seyton, Seyton v Satterthwaite* supra (statutory provision for the benefit of 'his wife for her separate use and of his children').

8 *Re Wilmot, Wilmot v Betterton* (1897) 76 LT 415 at 417 per Stirling J. See also *Crockett v Crockett* (1848) 2 Ph 553 at 555 per Lord Cottenham LC; *Newill v Newill* (1872) 7 Ch App 253 at 256; *Re Jones, Lewis v Lewis* [1910] 1 Ch 167 at 172 per Joyce J.

9 *Newman v Nightingale* (1787) 1 Cox Eq Cas 341 (to A or her children for ever); *Crawford v Trotter* (1819) 4 Madd 361; *Cator v Cator* (1851) 14 Beav 463 (addition to previous settled legacy). A direction that the fund is 'to be secure for their use' or similar direction has been considered to show an intention to settle (*Vaughan v Marquis of Headfort* (1840) 10 Sim 639; *French v French* (1840) 11 Sim 257 ('in trust as aforesaid'); *Combe v Hughes* (1872) LR 14 Eq 415; *Re Mills, Mills v Mills* (1902) 22 NZLR 425), although a gift to the named person as a trustee for himself and children, without more, is not sufficient (*Newill v Newill* (1872) 7 Ch App 253 at 258; *Young v Young* (1918) 52 ILT 40). A separate gift to two of the children affected the decision in *Re Owen's Trusts* (1871) LR 12 Eq 316. As to whether or in what cases a power of appointment among the children may be held to be created see *Ward v Grey* (1859) 26 Beav 485 at 494 (commented on in *Hart v Tribe* (1863) 32 Beav 279 at 280); *Bradshaw v Bradshaw* [1908] 1 IR 288.

10 *Morse v Morse* (1829) 2 Sim 485; *Froggatt v Wardell* (1850) 3 De G & Sm 685; *Jeffery v De Vitre* (1857) 24 Beav 296; *Audsley v Horn* (1858) 26 Beav 195 (affd (1859) 1 De GF & J 226); *Ward v Grey* (1859) 26 Beav 485 ('A and her children' spoken of as 'A and her family' in another codicil).

11 *Gawler v Cadby* (1821) Jac 346; *Dawson v Bourne* (1852) 16 Beav 29; *Audsley v Horn* (1858) 26 Beav 195 at 235 (gift over if 'they' (meaning the children) died without issue); *Re Jones, Lewis v Lewis* [1910] 1 Ch 167 at 173; *Conyngham v Tripp* [1925] 1 IR 27.

12 *Garden v Pulteney, Southcote v Earl of Bath* (1765) 2 Eden 323 (if there should be but one younger son, the whole to him); *Parsons v Coke* (1858) 4 Drew 296 (issue to take parents' share); *Newill v Newill* (1872) 7 Ch App 253 at 257-258 (direction that children should take shares in whole fund), approving *Armstrong v Armstrong* (1869) LR 7 Eq 518 at 522.

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675. Devise to a person and his issue.

In a devise of real property to a person 'and his issue', prima facie 'issue' is used as a word of limitation¹, but it may be a description of the persons to take². Before 1 January 1926, a devise to a person and his issue was treated as equivalent to a devise to the donee and the heirs of his body, and he took an estate tail, as it was presumed that the testator intended the whole line of his issue to benefit³.

In such a gift 'issue' was certainly a word of limitation if there were no issue at the date of the will⁴. 'Issue' does not now, however, create an entail, and under such a gift the donee takes the fee simple⁵. Where, however, the context shows that the issue are to take under the gift as purchasers, then prima facie they take as joint tenants with the named person⁶.

Formerly a gift of a succession of interests in real estate to donees, some of whom were not allowed by law to take as purchasers, might be construed under the cy-près doctrine to be a gift of an estate tail in one of them, where that estate, if allowed to descend unbarred, would carry the property to the donees and no others⁷; and words referring to successive generations have been held to be descriptive of the descent of an estate tail and used as words of limitation⁸. This construction is, however, not now normally possible⁹.

1 *Tate v Clarke* (1838) 1 Beav 100 at 105; *Slater v Dangerfield* (1846) 15 M & W 263 at 272.

2 See PARA 624 ante.

3 *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 872 per Lord Cranworth LC. See also *Martin v Swannell* (1840) 2 Beav 249; *Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 324 per Parker J; *Re Hammond, Parry v Hammond* [1924] 2 Ch 276 at 280 (where the rule stated in the text was applied to the specific devise). Cf REAL PROPERTY vol 39(2) (Reissue) PARA 172. In a gift to A or his issue, 'or' might be changed into 'and', so that A took an estate tail (*Re Clerke, Clowes v Clerke* [1915] 2 Ch 301; *Re Hayden, Pask v Perry* [1931] 2 Ch 333), or, on the construction of the whole will, a fee simple estate (*W Gardiner & Co Ltd v Dessaix* [1915] AC 1096, PC). See also PARA 631 ante.

4 In such a case the rule in *Wild's Case* (1599) 6 Co Rep 16b at 17a applied: *Campbell v Bouskell* (1859) 27 Beav 325; *Underhill v Roden* (1876) 2 ChD 494. See further PARA 673 ante.

5 See the Law of Property Act 1925 s 130(1), (2) (repealed); and PARA 671 ante. It is not possible to create entailed interests by instruments coming into operation on or after 1 January 1997: see PARA 671 ante.

6 *Re Wilmot, Wilmot v Betterton* (1897) 76 LT 415 (where the second branch of the rule in *Wild's Case* (1599) 6 Co Rep 16b was applied, although there were no issue in existence). By force of the context the issue may take in succession to their ancestor: *Doe d Gilman v Elvey* (1803) 4 East 313 (to A and his issue as tenants in common if more than one), following *Doe d Davy v Burnsall* (1794) 6 Term Rep 30; *Trevor v Trevor* (1847) 1 HL Cas 239 (to A and her issue in tail male in strict settlement); *Re Lord Lawrence, Lawrence v Lawrence* [1915] 1 Ch 129, CA.

7 As to the cy-près doctrine in this connection see PARA 521 ante; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1004; POWERS vol 36(2) (Reissue) PARA 275.

8 *Wollen v Andrewes* (1824) 2 Bing 126; *Fetherston v Fetherston* (1835) 3 Cl & Fin 67, HL ('heirs male, according to their seniority'); *Trash v Wood* (1839) 4 My & Cr 324 (to 'T's children and so on for ever'); *Snowball v Procter* (1843) 2 Y & C Ch Cas 478 (to children 'and their children after them respectively'); *Jenkins v Hughes* (1860) 8 HL Cas 571; *Forsbrook v Forsbrook* (1867) 3 Ch App 93; *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406. See PARA 668 ante.

9 An entailed interest could not be created by informal expressions: see the Law of Property Act 1925 s 130(1) (repealed); and PARA 671 ante. It is not possible to create entailed interests by instruments coming into operation on or after 1 January 1997: see PARA 671 ante. As to the possibility that the cy-près doctrine may in certain cases still apply see PARA 521 note 6 ante.

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676. Bequest to a person and his issue.

In a gift of personalty to a person 'and his issue'¹, prima facie all take by purchase², and concurrently as joint tenants³, but the context and the circumstances may show a contrary intention. Thus gifts of personal estate to a person and his issue have in several cases conferred an absolute interest on him⁴, particularly where there was a gift over on failure of issue generally⁵; in such cases the context showed that the words were used as words of limitation, whether or not they were so used being a question of construction in each particular case⁶. The result would be the same now, as 'issue' does not create an entailed interest after 31 December 1925⁷. In other cases, under a gift to a person and his issue, the issue have taken alternatively (that is to say, only if their ancestor was not in existence at the time of distribution), either by way of substitution⁸ or by way of original gift⁹, or have taken in succession to their parent¹⁰.

1 As to bequests to a person for his life and after his death to his issue see PARA 669 note 10 ante.

2 *Re Longworth, Longworth v Campbell* [1910] 1 IR 23 at 35; *Re Taylor's Trusts, Taylor v Blake* [1912] 1 IR 1 at 9. The reason for the rule in relation to devises of realty (see PARA 675 text and note 3 ante) does not apply to personalty: see *Re Hammond, Parry v Hammond* [1924] 2 Ch 276 at 280-281 per Tomlin J (decision on the second question, which concerned personalty not realty), approving the statement in *Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 324 per Parker J.

3 *Re Wilmot, Wilmot v Betterton* (1897) 76 LT 415 at 417 (issue). In *Law v Thorp* (1858) 4 Jur NS 447, in the context the donees took as tenants in common with benefit of survivorship between them.

4 *Fereyes v Robertson* (1731) Bunb 301; *Howston v Ives* (1746) 2 Eden 216; *Donn v Penny* (1815) 1 Mer 20; *Lyon v Mitchell* (1816) 1 Madd 467; *Samuel v Samuel* (1845) 9 Jur 222; *Parkin v Knight* (1846) 15 Sim 83. See also *A-G v Bright* (1836) 2 Keen 57; *Tate v Clarke* (1838) 1 Beav 100; *Jordan v Lowe* (1843) 6 Beav 350 (commented on in *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188 at 209).

5 *Donn v Penny* (1815) 1 Mer 20; *Beaver v Nowell* (1858) 25 Beav 551; *Re Andrew's Will* (1859) 27 Beav 608.

6 *Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 324 per Parker J. See also *Re Hammond, Parry v Hammond* [1924] 2 Ch 276.

7 See PARA 671 ante.

8 *Butter v Ommoney* (1827) 4 Russ 70 (residue); *Pearson v Stephen* (1831) 5 Bli NS 203, HL; *Dick v Lacy* (1845) 8 Beav 214; *Re Stanhope's Trusts* (1859) 27 Beav 201.

9 *Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 325.

10 *Parsons v Coke* (1858) 4 Drew 296.

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(v) Concurrent Gifts

A. JOINT TENANCY AND TENANCY IN COMMON

677. General rules.

Where property is given to several persons concurrently, the questions whether these persons take as joint tenants or tenants in common¹, and, if as tenants in common, what shares they take², depend on the testator's intention to be ascertained from the words of his will as a whole³, but prima facie a gift to several persons, without words of severance, is a gift to them as joint tenants⁴. Slight indications of an intention to divide the property may negative the idea of a joint tenancy⁵, and in a case of ambiguity the court leans to the construction which creates a tenancy in common in preference to that which creates a joint tenancy⁶. If there is to be a sharing, prima facie the shares must be equal⁷. Where a gift comprises original and substitutional shares, a single set of words of severance can properly be applied not only to the original but also to the substituted shares⁸.

1 As to joint tenancy and tenancy in common see PERSONAL PROPERTY vol 35 (Reissue) PARAS 1243-1245; REAL PROPERTY vol 39(2) (Reissue) PARAS 189 et seq, 207 et seq. A tenancy in common or joint tenancy in land can exist in equity either behind a trust for sale or in a trust of land (without a duty to sell): see the Trusts of Land and Appointment of Trustees Act 1996 ss 1-5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 64 et seq, 190 et seq. As to gifts to corporations and others see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1245 et seq.

2 A husband and wife, when taking with other persons, formerly took one share between them (*Re Jeffery, Nussey v Jeffery* [1914] 1 Ch 375), but under a disposition made or coming into operation after 31 December 1925 they are treated as two persons (Law of Property Act 1925 s 37). As to tenancy by entireties, and as to its abolition by s 39(6), Sch 1 Pt VI, see REAL PROPERTY vol 39(2) (Reissue) PARAS 227-228. As to a devise to 'heirs' who are co-heiresses see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 640. See also *Re Baker, Pursey v Holloway* (1898) 79 LT 343.

3 For this general principle of construction see PARA 513 ante.

4 *Lady Shore v Billingsly* (1687) 1 Vern 482; *Morley v Bird* (1798) 3 Ves 629 at 630; *Stuart v Bruce* (1798) 3 Ves 632; *Crooke v De Vandes* (1803) 9 Ves 197 at 204; *Ritchie's Trustees v M'Donald* 1915 SC 501; *Re Clarkson, Public Trustee v Clarkson* [1915] 2 Ch 216; *Re Brooke's Will Trusts, Jubber v Brooke* [1953] 1 All ER 668 at 674, [1953] 1 WLR 439 at 448. Thus under a gift of personalty to A and his children, prima facie they take as joint tenants: *Re Wilmot, Wilmot v Betterton* (1897) 76 LT 415 at 417. The gift may be either specific or residuary (*Morley v Bird* (1798) 3 Ves 628; *Crooke v De Vandes* (1803) 9 Ves 197 at 204; *Walmsley v Foxhall* (1863) 1 De GJ & Sm 605; *M'Donnell v Jebb* (1865) 16 L Ch R 359), and either direct or made through the medium of a trust (*Aston v Smallman* (1706) 2 Vern 556; *Bustard v Saunders* (1843) 7 Beav 92; *Re Clarkson, Public Trustee v Clarkson* [1915] 2 Ch 216 at 220).

5 *Robertson v Fraser* (1871) 6 Ch App 696 at 699 per Lord Hatherley LC (followed in *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206 at 211); *Re North, North v Cusden* [1952] Ch 397, [1952] 1 All ER 609. See also *Re Wilmot, Wilmot v Betterton* (1897) 76 LT 415 at 417. The mere fact that the interest is to be divided is not sufficient to make a tenancy in common of the capital: *Crooke v De Vandes* (1803) 9 Ves 197 at 206. A description of the donees as 'joint tenants', although a technical description, is not necessarily fatal to a tenancy in common: *Booth v Alington* (1857) 3 Jur NS 835. Where a trust is implied, in default of the exercise of a power, for the members of the class in whose favour the power might have been exercised, the implied trust, subject to any indication of the donor's intention to the contrary, is for distribution equally as tenants in common: see POWERS vol 36(2) (Reissue) PARA 215. As to the inconsistency between a power of advancement and a joint tenancy see *Bennett v Houldsworth* (1911) 104 LT 304; and POWERS vol 36(2) (Reissue) PARA 256.

6 *Jolliffe v East* (1789) 3 Bro CC 25; *Re Woolley, Wormald v Woolley* [1903] 2 Ch 206 at 211 per Joyce J; *Bennett v Houldsworth* [1911] WN 47; *Re Fisher, Robinson v Eardley* [1915] 1 Ch 302. Nevertheless, in a grant to two persons jointly and severally, 'severally' was rejected and they took as joint tenants: *Slingsby's Case* (1587) 5 Co Rep 18b at 19a.

7 *Robertson v Fraser* (1871) 6 Ch App 696 at 700; *Fisher v Anderson* (1880) 4 SCR 406 at 419.

8 *Crosthwaite v Dean* (1879) 40 LT 837; *Re Froy, Froy v Froy* [1938] Ch 566, [1938] 2 All ER 316. In *Re Sibley's Trusts* (1877) 5 ChD 494, there was a gift to 'all and every the children of F or their issue in equal shares per capita'; four of the six children were dead at the date of the will, and it was held that their issue took the shares of their deceased ancestors between themselves as tenants in common. Cf *Amies v Skillern* (1845) 14 Sim 428. See also *Bridge v Yates* (1842) 12 Sim 645 (where the issue or children took as joint tenants, prior words of severance not extending to their shares); *Penny v Clarke* (1860) 1 De GF & J 425; *Lanphier v Buck* (1865) 2 Drew & Sm 484 at 498.

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678. Words creating a joint tenancy.

A limitation made to next of kin¹ (whether described as such or referred to as 'relatives'²), or to issue³, or to legal personal representatives⁴, or to next personal representatives⁵, or to children described as 'families'⁶, 'family'⁷ or simply as 'children'⁸, may constitute the donees joint tenants. A gift may create a joint tenancy between parents and children⁹.

1 *Baker v Gibson* (1849) 12 Beav 101.

2 *Eagles v Le Breton* (1873) LR 15 Eq 148.

3 *Hill v Nalder* (1852) 17 Jur 224; *Hobgen v Neale* (1870) LR 11 Eq 48.

4 *Walker v Marquis of Camden* (1848) 16 Sim 329.

5 *Stockdale v Nicholson* (1867) LR 4 Eq 359; *Booth v Vicars* (1844) 1 Coll 6; *Re Kilvert, Midland Bank Executor and Trustee Co Ltd v Kilvert* [1957] Ch 388 at 398, [1957] 2 All ER 196 at 203.

6 *Burt v Hellyar* (1872) LR 14 Eq 160.

7 *Wood v Wood* (1843) 3 Hare 65; *Gregory v Smith* (1852) 9 Hare 708.

8 *Oates d Hatterley v Jackson* (1742) 2 Stra 1172; *Binning v Binning* [1895] WN 116. See also *Mence v Bagster* (1850) 4 De G & Sm 162; *Kenworthy v Ward* (1853) 11 Hare 196; *Noble v Stow* (1859) 29 Beav 409.

9 *Mason v Clarke* (1853) 17 Beav 126; *Jury v Jury* (1882) 9 LR Ir 207. See also *Armstrong v Armstrong* (1869) LR 7 Eq 518. As to a gift to two persons for their joint lives with a contingent remainder over to the survivor in fee see *Vick v Edwards* (1735) 3 P Wms 372; *Re Harrison* (1796) 3 Anst 836. See also *Barker v Gyles* (1727) 3 Bro Parl Cas 104; *Doe d Young v Sotheron* (1831) 2 B & Ad 628; *Quarm v Quarm* [1892] 1 QB 184.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(v) Concurrent Gifts/A. JOINT TENANCY AND TENANCY IN COMMON/679. Words creating a tenancy in common.

679. Words creating a tenancy in common.

A conveyance of property to two persons in moieties creates a tenancy in common¹ between them, and a grant of a moiety creates a tenancy in common between the grantor and the grantee². If, therefore, a will directs that property is to be divided³, or to be equally divided⁴, or to be distributed in joint and equal proportions⁵, or that the parties are to participate⁶, or if the gift is among persons equally⁷, or share and share alike⁸, or in equal shares and proportions⁹, or

in moieties¹⁰, or among¹¹ or between¹² the donees, or is given to them respectively¹³, or to each of them¹⁴, a tenancy in common is created¹⁵. Further, a reference to shares (for example the imposing of an obligation on donees to make payments in equal shares) will convert what would otherwise be a joint tenancy into a tenancy in common¹⁶. As a matter of construction, expressions apparently indicating a joint tenancy may be controlled by other expressions conferring a tenancy in common¹⁷. Expressions indicating a tenancy in common may, however, be modified by a subsequent clear expression of intention to create a joint tenancy¹⁸.

In certain cases, to give effect to the whole will, the severance in interest is made to commence at a future time; thus joint estates for life and separate remainders may be created¹⁹, for example by gifts of real estate to several persons, who cannot all marry, and the heirs of their bodies²⁰, or in other cases in a sufficient context²¹.

There is no necessity, in a gift by will, for the application of the rule affecting conveyances operating at common law²² that there can be no joint tenancy where the co-tenants come into existence at different times, or their interests vest at different times²³, although in both cases the joint tenant must take the same quantity of interest²⁴. However, the fact that the vesting of a gift in a will must take place at different times otherwise than by the donees coming into being at different times has been treated as an indication of a tenancy in common²⁵.

In a gift to a number of persons and the 'survivors' of them or 'with benefit of survivorship', these words may be used as words of limitation to indicate that, even though the named persons take originally as tenants in common, on the death of any of them the survivors are to take the whole estate²⁶.

1 Tenancy in common of land no longer subsists at law, but can exist in equity either behind a trust for sale or in a trust of land (without a duty to sell): see the Trusts of Land and Appointment of Trustees Act 1996 ss 1-5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 64 et seq, 207 et seq. Accordingly, in relation to land, references to tenancy in common are now applicable only in relation to equitable interests: cf eg *Re North, North v Cusden* [1952] Ch 397, [1952] 1 All ER 609.

2 Co Litt 190b, 198b; 2 Bl Com (14th Edn) 193, 399.

3 *Peat v Chapman* (1750) 1 Ves Sen 542; *Ackerman v Burrows* (1814) 3 Ves & B 54.

4 *Phillips v Phillips* (1701) 1 P Wms 34; *Barker v Giles* (1725) 2 P Wms 280; *Jolliffe v East* (1789) 3 Bro CC 25; *Turner v Whittaker* (1856) 23 Beav 196; *Lucas v Goldsmid* (1861) 29 Beav 657; *Davis v Bennett* (1862) 4 De GF & J 327.

5 *Ettricke v Ettricke* (1767) Amb 656; *Gibbon v Warner* (1585) 14 Vin Abr 484 at 485.

6 *Robertson v Fraser* (1871) 6 Ch App 696.

7 *Lewen v Dodd* (1599) Cro Eliz 443; *Denn d Gaskin v Gaskin* (1777) 2 Cowp 657.

8 *Heathe v Heathe* (1741) 2 Atk 121; *Perry v Woods* (1796) 3 Ves 204.

9 *Payne v Webb* (1874) LR 19 Eq 26.

10 *Harrison v Foreman* (1800) 5 Ves 207.

11 *Richardson v Richardson* (1845) 14 Sim 526.

12 *Lashbrook v Cock* (1816) 2 Mer 70; *A-G v Fletcher* (1871) LR 13 Eq 128.

13 *Stephens v Hide* (1734) Cas temp Talb 27; *Haws v Haws* (1747) 1 Ves Sen 13; *Marryat v Townly* (1748) 1 Ves Sen 102; *Folkes v Western* (1804) 9 Ves 456; *Davis v Bennett* (1862) 4 De GF & J 327. See also *Vanderplank v King* (1842) 3 Hare 1; *Re Moore's Settlement Trusts* (1862) 31 LJ Ch 368; but see *Re Hodgson's Trust* (1854) 1 K & J 178; *Hobgen v Neale* (1870) LR 11 Eq 48.

14 *Hatton v Finch* (1841) 4 Beav 186.

15 See *Thorowgood v Collins* (1672) Cro Car 75; *Sheppard v Gibbons* (1742) 2 Atk 441; *Loveacres d Mudge v Blight* (1775) 1 Cowp 352. A gift to 'next of kin according to the Statute of Distribution' created a tenancy in common (*Fielden v Ashworth* (1875) LR 20 Eq 410; *Re Richards, Davies v Edwards* [1910] 2 Ch 74; and see *Horn v Coleman* (1853) 1 Sm & G 169; *Bullock v Downes* (1860) 9 HL Cas 1; *Re Ranking's Settlement Trusts* (1868) LR 6 Eq 601 (not following *Horn v Coleman* supra and *Re Greenwood's Will* (1861) 8 Jur NS 907)); but it was otherwise if the reference to the statute was merely for the purpose of indicating the beneficiaries (*Withy v Mangles* (1843) 10 Cl & Fin 215, HL). See also *Elmsley v Young* (1835) 2 My & K 780; *Tiffin v Longman* (1852) 15 Beav 275; *Eagles v Le Breton* (1873) LR 15 Eq 148. Cf *Re Gray's Settlement, Akers v Sears* [1896] 2 Ch 802.

16 *Re North, North v Cusden* [1952] Ch 397, [1952] 1 All ER 609. See also *Kew v Rouse* (1685) 1 Vern 353; *Gant v Lawrence* (1811) Wight 395; *Alloway v Alloway* (1843) 4 Dr & War 380; *Ive v King* (1852) 16 Beav 46; *Jones v Jones* (1881) 44 LT 642; *Re Ward, Partridge v Hoare-Ward* [1920] 1 Ch 334 (advancement clause).

17 *Booth v Alington* (1857) 3 Jur NS 835; *Re Wilder's Trusts* (1859) 27 Beav 418; *Paterson v Rolland* (1860) 28 Beav 347; *Oakley v Wood* (1867) 16 LT 450; *Ryves v Ryves* (1871) LR 11 Eq 539. See, however, *Barker v Gyles* (1727) 3 Bro Parl Cas 104; *Jolliffe v East* (1789) 3 Bro CC 25; *Cookson v Bingham* (1853) 17 Beav 262 (affd 3 De GM & G 668); *Edwardes v Jones* (1864) 33 Beav 348; *Yarrow v Knightly* (1878) 8 ChD 736, CA; *Jury v Jury* (1882) 9 LR Ir 207. As to the effect of words of survivorship in a gift see *Lord Bindon v Earl of Suffolk* (1707) 1 P Wms 96; *Perry v Woods* (1796) 3 Ves 204; *Russell v Long* (1799) 4 Ves 551; *Ashford v Haines* (1851) 21 LJ Ch 496. Cf *Moore v Cleghorn* (1847) 10 Beav 423; *Haddelsey v Adams* (1856) 22 Beav 266.

18 *Hurd v Lenthall* (1649) Sty 211; *Stephens v Hide* (1734) Cas temp Talb 27; *Malcolm v Martin* (1790) 3 Bro CC 50; *Armstrong v Eldridge* (1791) 3 Bro CC 215; *Townley v Bolton* (1832) 1 My & K 148; *Ashley v Ashley* (1833) 6 Sim 358; *Pearce v Edmeades* (1838) 3 Y & C Ex 246; *M'Dermott v Wallace* (1842) 5 Beav 142; *Begley v Cook* (1856) 3 Drew 662; *Alt v Gregory* (1856) 8 De GM & G 221; *Cranswick v Pearson, Pearson v Cranswick* (1862) 31 Beav 624; *Daly v Aldworth* (1863) 15 L Ch R 69. Cf *Willes v Douglas* (1847) 10 Beav 47; *Arrow v Mellish* (1847) 1 De G & Sm 355; *Hawkins v Hamerton* (1848) 16 Sim 410; *Ewington v Fenn* (1852) 16 Jur 398; *Re Laverick's Estate* (1853) 18 Jur 304; *Abrey v Newman* (1853) 16 Beav 431; *Re Drakeley's Estate* (1854) 19 Beav 395; *Swan v Holmes* (1854) 19 Beav 471; *Sarel v Sarel* (1856) 23 Beav 87; *Turner v Whittaker* (1856) 23 Beav 196; *Lill v Lill* (1857) 23 Beav 446; *Brown v Jarvis* (1860) 2 De GF & J 168; *Archer v Legg* (1862) 10 WR 703; *Wills v Wills* (1875) LR 20 Eq 342; *Re Hutchinson's Trusts* (1882) 21 ChD 811.

19 le created in equity by way of trust, not as legal estates.

20 Littleton's Tenures s 283; *Huntley's Case* (1574) 3 Dyer 326a; *Cook v Cook* (1706) 2 Vern 545 at 546; *Barker v Gyles* (1727) 3 Bro Parl Cas 104; *Forrest v Whiteway* (1849) 3 Exch 367; *Edwards v Champion* (1853) 3 De GM & G 202 at 216; *Shep Touch* (8th Edn) 442. The rule appears to have been recognised in the House of Lords: *Wilkinson v Spearman* (undated), cited in 2 Vern at 545 (limitation by deed); and see *Edwards v Champion* (1847) 1 De G & Sm 75 at 79 note (d). As to the use under the present law of 'heir' as a word of purchase in equitable limitations see PARA 628 note 1 ante.

21 See *Doe d Littlewood v Green* (1838) 4 M & W 229; *Re Atkinson, Wilson v Atkinson* [1892] 3 Ch 52 (following *Re Tiverton Market Act, ex p Tanner* (1855) 20 Beav 374 and *Doe d Littlewood v Green* supra; and distinguishing *Gordon v Atkinson* (1847) 1 De G & Sm 478, where an initial tenancy in common was created). See REAL PROPERTY vol 39(2) (Reissue) PARA 210.

22 See REAL PROPERTY vol 39(2) (Reissue) PARA 194.

23 See REAL PROPERTY vol 39(2) (Reissue) PARA 193. See also *M'Gregor v M'Gregor* (1859) 1 De GF & J 63 at 73.

24 *Woodgate v Unwin* (1831) 4 Sim 129 (explained in *M'Gregor v M'Gregor* (1859) 1 De GF & J 63 at 73). See REAL PROPERTY vol 39(2) (Reissue) PARA 193.

25 *Hand v North* (1863) 10 Jur NS 7 (gift to two persons 'as they attain 21'), explaining *Woodgate v Unwin* (1831) 4 Sim 129 as decided on this ground; considered in *Re Manly's Will Trusts, Burton v Williams* [1969] 3 All ER 1011, [1969] 1 WLR 1818.

26 *Doe d Borwell v Abey* (1813) 1 M & S 428; *Hatton v Finch* (1841) 4 Beav 186; *Haddelsey v Adams* (1856) 22 Beav 266 (approved in *Taaffe v Conmee* (1862) 10 HL Cas 64 at 83). Cf *Re Drakeley's Estate* (1854) 19 Beav 395; *Wisden v Wisden* (1854) 2 Sm & G 396; *Wiley v Chantepedrix* [1894] 1 IR 209 at 220. As to the effect of limitations to joint tenants and the survivor of them see Challis's Law of Real Property (3rd Edn) 368.

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B. DISTRIBUTION PER CAPITA AND PER STIRPES

680. Distribution prima facie per capita.

In a gift to a number of donees the distribution between them may be intended to be made per capita, in which case each donee takes a share equal in amount to the share of each other donee, or per stirpes, in which each family or stock takes an equal share with every other family or stock, and the share is then subdivided equally between the members of the family or stock. This is the case whether the donees take as a class¹, or as a combination of classes², or whether the gift is to named persons and a class taking together as a single class³, or to named persons, taking as individuals, together with a class⁴, or to a number of persons as individuals and not as a class⁵. Prima facie the distribution is made per capita and not per stirpes, but the context may easily displace that rule; it is easier to infer a stirpital distribution in what are called cases of family distribution⁶. The prima facie rule is applied even where the bequest is to persons who, under the statutory rules of distribution on intestacy, would take per stirpes⁷, and the fact that the donees are living relations of the testator and the children of deceased relations of the same relationship does not ordinarily take the case out of the rule⁸.

1 *Weld v Bradbury* (1715) 2 Vern 705 (the children of J S and J N); *Butler v Stratton* (1791) 3 Bro CC 367 (descendants of A and B); *Lady Lincoln v Pelham* (1804) 10 Ves 166 at 175; *Tomlin v Hatfield* (1841) 12 Sim 167; *Turner v Hudson* (1847) 10 Beav 222 (parents and children 'to be classed together'); *Pattison v Pattison* (1855) 19 Beav 638 ('their said children'); *Re Lloyd's Estate, Baker v Mason* (1856) 2 Jur NS 539; *Armitage v Williams* (1859) 27 Beav 346; *Rook v A-G* (1862) 31 Beav 313; *Weldon v Hoyland* (1862) 4 De GF & J 564 (issue); *Re Stone, Baker v Stone* [1895] 2 Ch 196, CA (children of the aforesaid).

2 *Northey v Strange* (1716) 1 P Wms 340 at 343 (children and grandchildren); *Barnes v Patch* (1803) 8 Ves 604; *Dugdale v Dugdale* (1849) 11 Beav 402; *Cancellor v Cancellor* (1862) 2 Drew & Sm 194 (children and issue); *Re Fox's Will* (1865) 35 Beav 163 (surviving brothers and sister and their children).

3 *Kekewich v Barker* (1903) 88 LT 130, HL.

4 *Blackler v Webb* (1726) 2 P Wms 383; *Butler v Stratton* (1791) 3 Bro CC 367; *Lenden v Blackmore* (1840) 10 Sim 626; *Dowding v Smith* (1841) 3 Beav 541; *Paine v Wagner* (1841) 12 Sim 184; *Rickabe v Garwood* (1845) 8 Beav 579; *Cunningham v Murray* (1847) 1 De G & Sm 366; *Baker v Baker* (1847) 6 Hare 269; *Amson v Harris* (1854) 19 Beav 210; *Tyndale v Wilkinson* (1856) 23 Beav 74; *Re Harper, Plowman v Harper* [1914] 1 Ch 70.

5 *Cooke v Bowen* (1840) 4 Y & C Ex 244. Cf *Re Upton, Barclays Bank Ltd v Upton* (1965) 109 Sol Jo 236, CA (where there was a gift to named grand-nephews and grand-nieces of the testator's husband per stirpes).

6 *Re Hall, Parker v Knight* [1948] Ch 437 at 440; *Re Birkett, Holland v Duncan* [1950] Ch 330, [1950] 1 All ER 316.

7 *Lady Lincoln v Pelham* (1804) 10 Ves 166 at 176.

8 *Blackler v Webb* (1726) 2 P Wms 383; *Amson v Harris* (1854) 19 Beav 210; *Payne v Webb* (1874) 31 LT 637; *Evans v Turner* (1904) 23 NZLR 825. Cf *Re Walbran, Milner v Walbran* [1906] 1 Ch 64 ('to be equally divided between children of A and B') (distinguished in *Re Harper, Plowman v Harper* [1914] 1 Ch 70 at 75; but followed in *Re Prosser, Prosser v Griffith* [1929] WN 85). 'Between', although originally referring to two, has been extended to more than two: *Re Cossentine, Philp v Wesleyan Methodist Local Preachers' Mutual Aid Association Trustees* [1933] Ch 119 (following *Re Harper, Plowman v Harper* supra; and distinguishing *Re Walbran, Milner v Walbran* supra). See also *Cobban's Executors v Cobban* 1915 SC 82; and PARA 622 ante. While 'between' normally indicates distribution per capita, as in *Re Alcock, Bonser v Alcock (Seville)* [1945] Ch 264, [1945] 1 All ER 613 and *Campbell's Trustees v Welsh* 1952 SC 343, the prima facie meaning may be displaced and distribution be per stirpes, as in *Re Walbran, Milner v Walbran* supra; *Re Hall, Parker v Knight* [1948] Ch 437; *Re Jeeves, Morris-Williams v Haylett* [1949] Ch 49, [1948] 2 All ER 961. A division among persons by name indicates a division per capita: *Re Jeffrey, Welch v Jeffrey* [1948] 2 All ER 131.

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681. Inference from context in favour of distribution per stirpes.

Although prima facie a distribution is made per capita¹, the context of the whole will may require a stirpital distribution². Such a construction has been adopted where the number of shares was mentioned and was equal to the number of parents³, where the words used implied a further subdivision of a share⁴, where there was a reference to the Statutes of Distribution⁵, and where the gift was to a number of parents and their children in such a manner that the children were substituted for⁶, or took on the death of, their respective parents⁷. Gifts to several parents and at, or after, their deaths to their children, or to their issue, have received this construction as meaning at or after their respective deaths⁸.

If a stirpital division is once clearly indicated, the court leans to a stirpital division throughout⁹. Where, however, the children of all the parents are mentioned together as forming a single group or class to take under a single gift without any other indication of distribution per stirpes, the children take per capita¹⁰. If the gift is postponed to the death of all the parents, then, where the intermediate income after the death of any parent is given to or is to be applied for the benefit of his children per stirpes, this fact is an element to be considered in favour of distribution of the capital per stirpes¹¹, but does not rebut a clear direction that the distribution is to be per capita¹².

¹ See PARA 680 ante.

² *Brett v Horton* (1841) 4 Beav 239 at 242; *Nettleton v Stephenson* (1849) 18 LJ Ch 191 (gift over to others of the class per stirpes); *Archer v Legg* (1862) 31 Beav 187 at 193 (gift over to others of the class per stirpes); *Re Sibley's Trusts* (1877) 5 ChD 494; *Campbell's Trustee v Dick* 1915 SC 100; *Re Hickey, Beddoes v Hodgson* [1917] 1 Ch 601 (legacy 'to the descendants' of A 'or their descendants living at my death').

³ *Overton v Banister* (1841) 4 Beav 205.

⁴ *Davis v Bennett* (1862) 4 De GF & J 327 at 329; *Capes v Dalton* (1902) 86 LT 129, CA (revsd sub nom *Kekewich v Barker* (1903) 88 LT 130, HL).

⁵ *Mattison v Tanfield* (1840) 3 Beav 131; *Lewis v Morris* (1854) 19 Beav 34. As to the Statutes of Distribution see PARA 632 ante.

⁶ *Rowland v Gorsuch, Price v Gorsuch* (1798) 2 Cox Eq Cas 187 (criticised in *Re Kilvert, Midland Bank Executor and Trustee Co Ltd v Kilvert* [1957] Ch 388, [1957] 2 All ER 196); *Alker v Barton* (1842) 12 LJ Ch 16; *Congreve v Palmer* (1853) 16 Beav 435; *Timins v Stackhouse* (1858) 27 Beav 434; *Palmer v Crutwell* (1862) 8 Jur NS 479; *Gowling v Thompson* (1868) LR 11 Eq 366n; *Re Alchorne, Eade v Bourner* (1911) 130 LT Jo 528; *Re Daniel, Jones v Michael* [1945] 2 All ER 101. Cf *Atkinson v Bartrum* (1860) 28 Beav 219. As to substitutional gifts see PARA 612 ante. No presumption in favour of distribution per stirpes arises in case of an original alternative gift to issue (*Abbay v Howe* (1847) 1 De G & Sm 470), but the description of issue by reference to their 'respective' parents (*Re Coulden, Coulden v Coulden* [1908] 1 Ch 320 at 326), or a direction that the issue are to take their parents' share (*Shand v Kidd* (1854) 19 Beav 310), are indications of distribution per stirpes.

⁷ 'Respective' in such cases points to a stirpital distribution: *Archer v Legg* (1862) 31 Beav 187 at 191; *Re Campbell's Trusts* (1886) 31 ChD 685 (affd 33 ChD 98, CA). See also *Hunt v Dorsett* (1855) 5 De GM & G 570. Cf *Smith v Streatfield* (1816) 1 Mer 358 at 361; *Booth v Vicars* (1844) 1 Coll 6; *Ayscough v Savage* (1865) 13 WR 373.

⁸ *Re Hutchinson's Trusts* (1882) 21 ChD 811. See also *Taniere v Pearkes* (1825) 2 Sim & St 383; *Flinn v Jenkins* (1844) 1 Coll 365; *Arrow v Mellish* (1847) 1 De G & Sm 355; *Willes v Douglas* (1847) 10 Beav 47; *Waldron v Boulter* (1856) 22 Beav 284; *Turner v Whittaker* (1856) 23 Beav 196; *Wills v Wills* (1875) LR 20 Eq 342; *Barnaby v Tassell* (1871) LR 11 Eq 363; *Re Browne's Will Trusts, Landon v Brown* [1915] 1 Ch 690; *McDonnell v Neil* [1951] AC 342, PC; *Re Errington, Gibbs v Lassam* [1927] 1 Ch 421 (where the rule that deaths

means respective deaths is stated and was held to apply to substituted gifts). Cf *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 686, HL, per Lord Davey; *Re Foster* [1946] Ch 135, [1946] 1 All ER 333.

9 *Re Smythe*, *Guinness v Smythe* [1932] IR 136.

10 *Stephens v Hide* (1734) Cas temp Talb 27; *Pearce v Edmeades* (1838) 3 Y & C Ex 246; *Abrey v Newman* (1853) 16 Beav 431; *Stevenson v Gullan* (1854) 18 Beav 590 (surviving children); *Swabey v Goldie* (1875) 1 ChD 380, CA (where the inconvenience of keeping intermediate income in suspense did not prevent per capita distribution).

11 *Brett v Horton* (1841) 4 Beav 239 at 242; *Re Campbell's Trusts* (1886) 31 ChD 685 (affd 33 ChD 98, CA). See also *Bradshaw v Melling* (1853) 23 LJ Ch 603 (express reference to trust of income). It appears, however, that such a fact is of itself insufficient to raise a presumption in favour of distribution per stirpes: *Re Stone, Baker v Stone* [1895] 2 Ch 196 at 200, CA, per Lopes LJ. A mere discretionary trust is insufficient: *Nockolds v Locke* (1856) 3 K & J 6.

12 *Re Stone, Baker v Stone* [1895] 2 Ch 196, CA.

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682. Substitution of issue.

Where in a gift issue are substituted for or take after their respective ancestors, the members of each set of issue prima facie take per capita as between themselves the share which is distributed per stirpes to them¹, but the context may show that the substitution is distributive throughout and a distribution per stirpes intended². A characteristic of distribution per stirpes is that remote descendants do not take in competition with a living immediate ancestor of their own who takes under the gift³.

1 *Armstrong v Stockham* (1843) 7 Jur 230; *Birdsall v York* (1859) 5 Jur NS 1237; *Gowling v Thompson* (1868) LR 11 Eq 366n; *Barnaby v Tassell* (1871) LR 11 Eq 363; *Re Sibley's Trusts* (1877) 5 ChD 494. See also *Re Cockle's Will Trusts*, *Re Pittaway*, *Moreland v Draffen*, *Risdon v Public Trustee* [1967] Ch 690, [1967] 1 All ER 391. As to the shares of substituted donees see PARAS 612, 617 ante.

2 *Ross v Ross* (1855) 20 Beav 645; *Re Orton's Trust* (1866) LR 3 Eq 375; *Gibson v Fisher* (1867) LR 5 Eq 51.

3 *Pearson v Stephen* (1831) 2 Dow & Cl 328; *Dick v Lacy* (1845) 8 Beav 214; *Amson v Harris* (1854) 19 Beav 210; *Re Bennett's Trust* (1857) 3 K & J 280 at 284; *Palmer v Crutwell* (1862) 8 Jur NS 479; *Gibson v Fisher* (1867) LR 5 Eq 51; *Re Rawlinson*, *Hill v Withall* [1909] 2 Ch 36 at 38.

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683. Determination of stocks.

The determination of the persons forming the stocks from which the stirpes are to spring is a matter of construction of each will. Sometimes it may appear from the terms of the gift that the stocks should be persons who might themselves take under the gift, for example the original takers for whom the stirpes are substituted¹, and not ancestors of such takers², but there is no rule of construction which requires that the stocks of descent are to be found among the takers and not among the ancestors³.

1 *Robinson v Shepherd* (1863) 4 De GJ & Sm 129; *Re Wilson, Parker v Winder* (1883) 24 ChD 664; *Re Dering, Neall v Beale* (1911) 105 LT 404; *Re Alexander, Alexander v Alexander* [1919] 1 Ch 371.

2 See *Gibson v Fisher* (1867) LR 5 Eq 51 (where the context required such a determination of the stocks).

3 *Sidney v Perpetual Trustees Estates and Agency Co of New Zealand Ltd* [1944] AC 194 at 202, [1944] 2 All ER 225 at 228, PC; *Re Upton, Barclays Bank Ltd v Upton* (1965) 109 Sol Jo 236, CA.

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684. Presumption as to interests of donees named together.

The context of a will may show that persons named together as donees are intended to take successively¹, either in the order of their names² or according to seniority in age³, whichever is appropriate to the context and the circumstances of the case. Without such a context, prima facie a gift to persons named together as donees is not construed to give them estates in succession⁴.

1 See eg *Re Green, Fitzwilliam v Green* (1916) 50 ILT 179 (bequest to widow 'during her lifetime to be held by her in the interest of my grandson'; interest given to widow for life, remainder to grandson). As to successive interests in consumables see PARA 413 ante; and as to the rule with regard to the construction of successive interests in real estate see REAL PROPERTY vol 39(2) (Reissue) PARA 162 et seq. As to the construction of successive interests in settled property generally see SETTLEMENTS vol 42 (Reissue) PARA 601 et seq.

2 *Stratford v Powell* (1807) 1 Ball & B 1. Similarly, if the testator gives one of a number of like things to each of several donees, prima facie it appears that the legatees exercise their rights of selection according to the priority of the gifts: *Duckmanton v Duckmanton* (1860) 5 H & N 219 at 222; *Asten v Asten* [1894] 3 Ch 260 at 263 per Romer J; and see PARA 418 note 4 ante.

3 *Ongley v Peale* (1712) 2 Ld Raym 1312; *Lewis d Ormond v Waters* (1805) 6 East 336 (first and other sons); *Young v Sheppard* (1847) 10 Beav 207 ('to devolve in succession upon my remaining children'); *Honywood v Honynwood* (1905) 92 LT 814, HL (first and other son); *Re Harcourt, Fitzwilliam v Portman* [1920] 1 Ch 492 (devise on death of eldest son without issue to every other son, other than a son entitled to the barony, every such son to take for life with remainder to his sons in tail). See also *Cradock v Cradock* (1858) 4 Jur NS 626. In the case of real estate, a direction for settlement on children in succession may be 'an epitome of a strict settlement': *Doe d Phipps v Lord Mulgrave* (1793) 5 Term Rep 320 at 324; *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613 at 623. There is a general rule of construction, not confined to wills, that 'first and other sons' imports successive interests: see *Re Gosset's Settlement, Gribble v Lloyds Bank* [1943] Ch 351 at 354, [1943] 2 All ER 515 at 516; *Lewis d Ormond v Waters* (1805) 6 East 336. Cf SETTLEMENTS vol 42 (Reissue) PARA 717.

4 *De Windt v De Windt* (1866) LR 1 HL 87; *Surtees v Surtees* (1871) LR 12 Eq 400; *Allgood v Blake* (1873) LR 8 Exch 160 at 169-170; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520 at 529-530, CA (in a gift to a class for life 'we have no right to import the word 'successive' or the word 'successively' or the words 'for the time being' or any words of that sort').

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(vi) Cumulative and Substitutional Gifts/685. Gifts clearly cumulative.

(vi) Cumulative and Substitutional Gifts

685. Gifts clearly cumulative.

A testator may well intend to give two or more gifts, of equal or unequal amounts, to the same donee, and, where the intention to do so is clear, effect is given to it¹. The question in each case is what is the intention collected from the whole will², and, although rules of construction of wills have been laid down for assisting in determining whether several legacies to the same person are cumulative or substitutional, they are applicable only where there is no internal evidence of intention in the testamentary instrument as, if there is such evidence, it must prevail³.

1 *Burkinshaw v Hodge* (1874) 22 WR 484. See also *Re Dyke, Dyke v Dyke* (1881) 44 LT 568 at 570; *Re Segelcke, Ziegler v Nicol* [1906] 2 Ch 301 (where the additional gift was held not to be reduced by the expression of an intention to make up the earlier gift to a certain amount, in fact less than the earlier gift).

2 *Guy v Sharp* (1833) 1 My & K 589 at 603. In treating a plurality of writings as constituting a single testamentary instrument or separate testamentary instruments, the probate is binding on the court of construction: *Baillie v Butterfield* (1787) 1 Cox Eq Cas 392; *Brine v Ferrier* (1835) 7 Sim 549; and see PARAS 488 ante. As to the presumption against double portions in the case of a child and a parent or person in loco parentis, where one gift is non-testamentary see EQUITY vol 16(2) (Reissue) PARA 740. As to when a subsequent gift is subject to conditions imposed with respect to the first gift see PARA 692 post.

3 *Kidd v North* (1846) 2 Ph 91 at 97 per Lord Cottenham LC. Thus where eg two wills are admitted to probate, the court of construction is entitled to look at both and draw conclusions from internal evidence so provided that a gift in the second will is substitutional, although the court is not entitled to regard the first will as revoked by the second in toto: *Re Plant, Johnson v Hardwicke*, as reported in [1952] Ch 298 at 301. As to a plurality of wills see note 2 supra.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(vi) Cumulative and Substitutional Gifts/686. Presumption in case of gifts in same instrument.

686. Presumption in case of gifts in same instrument.

Where two legacies are given by the same testamentary instrument¹ to the same person described in the same terms in each case, and are of the same specific thing or of the same specified amount, the second is presumed to be merely a repetition of the first², and prima facie the legatee takes only one such legacy. If, however, such legacies are of different specified amounts³, or have substantially different incidents⁴, or if one is a residuary gift and the other a specific or pecuniary legacy⁵, the second legacy is presumed to be cumulative, and prima facie the legatee takes both⁶.

1 As to the treatment of several instruments as a single will see PARA 685 note 2 ante.

2 *Garth v Meyrick* (1779) 1 Bro CC 30; *Holford v Wood* (1798) 4 Ves 76 at 86, 91; *Heming v Clutterbuck* (1827) 1 Bli NS 479, HL (where the judgment is based on an alleged finding of the ecclesiastical court that the two instruments were one will); *Brine v Ferrier* (1835) 7 Sim 549.

3 *Hooley v Hatton* (1773) 1 Bro CC 390n; *Curry v Pile* (1787) 2 Bro CC 225.

4 *Mackinnon v Peach* (1838) 2 Keen 555; *Ford v Ruxton* (1844) 1 Coll 403; *Inglefield v Coghlan* (1845) 2 Coll 247; *Thompson v Teulon, Teulon v Teulon* (1852) 22 LJ Ch 243; *Wildes v Davies* (1853) 22 LJ Ch 495 at 497. See also *Whyte v Kearney* (1827) 3 Russ 208. In *Manning v Thesiger* (1835) 3 My & K 29 (where the times of payment were different) and *Greenwood v Greenwood* (1776) 1 Bro CC 31n (one legacy to legatee's separate use), the differences were not sufficient to render the legacies cumulative.

5 *Kirkpatrick v Bedford, Bedford v Kirkpatrick* (1878) 4 App Cas 96 at 103, 109, HL; *Gordon v Alexander* (1858) 4 Jur NS 1097.

6 For a case of context to the contrary see *Yockney v Hansard* (1844) 3 Hare 620 (second annuity in substitution for first).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(3) QUANTITY OF INTEREST TAKEN/(vi) Cumulative and Substitutional Gifts/687. Presumption in case of gifts in different instruments.

687. Presumption in case of gifts in different instruments.

If the same specific thing is given by two different testamentary instruments¹ to the same person, the second gift is presumed to be a mere repetition of the first². Apart from such repeated specific gifts, the general principle is³ that if by different testamentary instruments two legacies, whether of the same or different amounts, are given to the same person, they are presumed to be additional to each other⁴. The presumption is strengthened by any substantial difference between the gifts⁵.

The context of the instruments may, however, lead to a contrary inference⁶. Thus where the later gift is of the same specified amount as the earlier⁷, and is expressed to be given for the same cause or motive⁸, prima facie the later gift is merely a repetition of the first⁹, and generally, whatever the amounts of the legacies, where the later instrument purports to explain¹⁰, repeat¹¹ or be in substitution for¹² the earlier instrument in respect of the gift, or otherwise to be the final declaration of the testator's intentions¹³, the later gift supersedes the earlier¹⁴.

1 As to what are separate instruments see PARA 685 note 2 ante.

2 *Duke of St Albans v Beauclerk* (1743) 2 Atk 636 at 640 per Lord Hardwicke LC; *Hooley v Hatton* (1773) 1 Bro CC 390n per Ashton J (in each case discussing the authorities in the civil law).

3 See the rule briefly stated in *Re Davies, Davies v Mackintosh* [1957] 3 All ER 52 at 54, [1957] 1 WLR 922 at 925.

4 *Foy v Foy* (1758) 1 Cox Eq Cas 163; *Ridges v Morrison* (1784) 1 Bro CC 389; *Baillie v Butterfield* (1787) 1 Cox Eq Cas 392; *Benyon v Benyon* (1810) 17 Ves 34 at 43; *Wray v Field* (1822) 6 Madd 300 (affd (1826) 2 Russ 257); *Mackenzie v Mackenzie* (1826) 2 Russ 262; *Lord v Sutcliffe* (1828) 2 Sim 273; *Robley v Robley* (1839) 2 Beav 95 at 101; *Tweeddale v Tweeddale* (1840) 10 Sim 453; *Radburn v Jervis, Hare v Hill* (1840) 3 Beav 450; *Forbes v Lawrence* (1844) 1 Coll 495; *Marquis of Hertford v Lord Lowther* (1844) 4 LTOS 450; *Lee v Pain* (1844) 4 Hare 201 at 215, 231; *Lobley v Stocks* (1854) 19 Beav 392; *Townshend v Mostyn* (1858) 26 Beav 72; *Johnstone v Earl of Harrowby* (1859) 1 De GF & J 183; *Cresswell v Cresswell* (1868) LR 6 Eq 69 at 76; *Re Davies, Davies v Mackintosh* [1957] 3 All ER 52, [1957] 1 WLR 922.

5 *Masters v Masters* (1718) 1 P Wms 421 at 423; *Suisse v Lord Lowther* (1843) 2 Hare 424 at 433; *Lee v Pain* (1845) 4 Hare 201 at 223-224 (legacies carrying interest from different dates and to legatee by different descriptions).

6 The fact that other legacies to other donees in the same will are given in terms expressly making them cumulative is some indication that legacies not so described are substitutional (*Allen v Callow* (1796) 3 Ves 289; *Barclay v Wainwright* (1797) 3 Ves 462; *Russell v Dickson* (1842) 2 Dr & War 133 at 139 (affd (1853) 4 HL Cas 293)), but is of slight importance in rebutting a presumption applicable to the case (*Mackenzie v Mackenzie* (1826) 2 Russ 262 at 273; *Suisse v Lord Lowther* (1843) 2 Hare 424 at 430). See also *Wray v Field* (1822) 6 Madd 300. Cf *Re Nixon, Askew v Briggs* (1965) 109 Sol Jo 757 (where in a home-made codicil the intention to substitute was inferred); *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd, Far West Children's Health Scheme v Perpetual Trustee Co Ltd* [1969] 1 AC 514, [1967] 3 All ER 915, PC (where a consistent scheme of benefits disclosed by the instruments rebutted the presumption that the legacies were cumulative). The fact that legacies are given in terms making them substitutional does not make other legacies not so described substitutional, where the presumption that they are cumulative is otherwise applicable: *Re Armstrong, Ayne v Woodward* (1893) 31 LR 154.

7 There is no presumption of repetition raised if in either instrument there is no motive or no motive other than the testator's own bounty (*Suisse v Lord Lowther* (1843) 2 Hare 424 at 432), or a different motive expressed, although the sums are the same, or where the same motive is expressed in both and the legacies are of different amounts (*Hurst v Beach* (1821) 5 Madd 351 at 358-359).

8 *Duke of St Albans v Beauclerk* (1743) 2 Atk 636; *Hurst v Beach* (1821) 5 Madd 351; *Wray v Field* (1822) 6 Madd 300 at 303 per Leach V-C; *Suisse v Lord Lowther* (1843) 2 Hare 424 at 432 per Wood V-C. For the meaning of 'the same cause' see *Wilson v O'Leary* (1872) 7 Ch App 448 at 455, CA. Where the gift in each case is to a person by description, for example to 'my servant', the descriptive words are not an expression of motive: *Roch v Callen* (1847) 6 Hare 531 at 534. See also *Suisse v Lord Lowther* supra.

9 *Duke of St Albans v Beauclerk* (1743) 2 Atk 636 at 640 per Lord Hardwicke LC (adopting the rule of the civil law); *Benyon v Benyon* (1810) 17 Ves 34 (to executor for his trouble).

10 *Moggridge v Thackwell* (1792) 1 Ves 464 at 473 per Lord Thurlow LC.

11 *Moggridge v Thackwell* (1792) 1 Ves 464 ('simple repetition, where it is exact and punctual, has been regarded as sufficient proof' that the legacies were not cumulative); *Tatham v Drummond* (1864) 33 LJ Ch 438. See also *Benyon v Benyon* (1810) 17 Ves 34 at 42 (gift of income of trust legacy altered); *Hubbard v Alexander* (1876) 3 ChD 738. Thus many legacies may be given to the same donees in the same or nearly the same terms as in the prior instrument: *Cootte v Boyd* (1789) 2 Bro CC 521; *Barclay v Wainwright* (1797) 3 Ves 462; *Whyte v Whyte* (1873) LR 17 Eq 50 (instruments of same date and contents). See also the cases cited in note 12 infra. In *Wilson v O'Leary* (1872) 7 Ch App 448, CA, this was not sufficient in the context and circumstances of that case to rebut the presumption that the legacies were cumulative.

12 *Duke of St Albans v Beauclerk* (1743) 2 Atk 636; *Jackson v Jackson* (1788) 2 Cox Eq Cas 35; *Osborne v Duke of Leeds* (1800) 5 Ves 369 at 382; *A-G v Harley* (1819) 4 Madd 263; *Gillespie v Alexander* (1824) 2 Sim & St 145; *Simon v Barber* (1829) Taml 14; *Fraser v Byng* (1829) 1 Russ & M 90 at 101-102; *Robley v Robley* (1839) 2 Beav 95; *A-G v George* (1843) 12 LJ Ch 165; *Suisse v Lord Lowther* (1843) 2 Hare 424 at 437; *Kidd v North* (1846) 2 Ph 91; *Duncan v Duncan (No 2)* (1859) 27 Beav 392; *Tuckey v Henderson* (1863) 33 Beav 174 (gifts of legacies by different instruments substitutional); *Bell v Park* [1914] 1 IR 158, Ir CA; *Grealey v Sampson* [1917] 1 IR 286, Ir CA; *Re Michell, Thomas v Hoskins* [1929] 1 Ch 552 (where two codicils of the same date were held to be duplicates of the same instrument); *Re Bagnall, Scale v Willett* [1948] WN 324; *Re Plant, Johnson v Hardwicke* [1952] Ch 298, [1952] 1 All ER 78n (gifts substitutional).

13 *Russell v Dickson* (1853) 4 HL Cas 293 (recital that testator had not time to alter will); cf *Sawrey v Rumney* (1852) 5 De G & Sm 698 (alteration as to a legacy in a will already altered by a previous codicil).

14 As to conditions attaching to cumulative and substituted legacies see PARA 693 post.

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(vii) Hotchpot Clauses

688. Hotchpot of prior advances.

A hotchpot clause¹ directing past advances or other sums or property² to be brought into account is construed so as to give effect to the whole will³ and, as in the case of other divesting provisions⁴, is in general construed strictly⁵. Such a clause is not, of itself, a release from the personal liability, if any, of the donees to repay such advances, at all events where the gift to the donee is settled on him for life⁶. A hotchpot clause as between members of a class cannot be used to enlarge the share of a beneficiary who is not a member of the class⁷.

'Advances' primarily means advances of money, whether by way of loan or by payment at the legatee's request⁸, and ordinarily does not include payments made after the testator's death, even in discharge of liabilities undertaken during his lifetime on the legatee's behalf⁹, or other kinds of property given during life¹⁰; but it may include all gifts during life, and advances made

by the trustees or executors of the testator after his death are included where those advances are contemplated in the will¹¹.

If the clause relates to advances made by any person in his lifetime, without more, a gift by the will of that person¹², or an interest taken under his intestacy¹³, is not within the clause.

1 As to the nature and purpose of a hotchpot clause see SETTLEMENTS vol 42 (Reissue) PARA 924. The object of such a clause is in general to produce equality as between the donees, taking into consideration past gifts. As to the effect of such clauses generally see *Fox v Fox* (1870) LR 11 Eq 142 (effect as notional increase of testator's estate); *Smith v Crabtree* (1877) 6 ChD 591 (exclusion of set-off of debt against specific legacy); *Wheeler v Humphreys* [1898] AC 506, HL. An advance to the life tenant of a settled share may have to be brought into account against the stirps: *Re Sparkes, Kemp-Welch v Kemp-Welch* (1911) 56 Sol Jo 90. A child is not liable to bring into account his parent's debt to the estate: *Re Binns, Public Trustee v Ingle* [1929] 1 Ch 677. A clause directing loans to a son, to be taken 'in and towards satisfaction' of his share of residue and 'to be brought into hotchpot and accounted for accordingly', was held to be a mere hotchpot clause adapted to loans instead of advances and not to operate as a release or gift: *Re Horn, Westminster Bank Ltd v Horn* [1946] Ch 254, [1946] 2 All ER 118, CA.

2 An appropriate hotchpot clause requiring appointed shares to be brought into account may result in life interests appointed having to be brought into account, but is prima facie confined to interests which are vested and not contingent and, as regards reversionary interests, to those which are absolutely and indefeasibly vested: *Re Gordon, Public Trustee v Bland* [1942] 1 Ch 131, [1942] 1 All ER 59 (applying *Re West, Denton v West* [1921] 1 Ch 533 at 540 per Astbury J). A life interest is brought into account at its actuarial value determined at the date it falls into possession: see *Re Westropp* (1903) 37 ILT 183; *Re Thomson Settlement Trusts, Robertson v Makepeace* [1953] Ch 414, [1953] 1 All ER 1139; and SETTLEMENTS vol 42 (Reissue) PARA 924.

3 *Brocklehurst v Flint* (1852) 16 Beav 100; *Stares v Penton* (1867) LR 4 Eq 40 (where the clause ceased to operate after one member of the class became entitled to payment); *Stewart v Stewart* (1880) 15 ChD 539. See also *Re Arbuthnot, Arbuthnot v Arbuthnot* [1915] 1 Ch 422; *Re Horn, Westminster Bank Ltd v Horn* [1946] Ch 254, [1946] 2 All ER 118, CA (disapproving *Re Trollope, Game v Trollope* [1915] 1 Ch 853). A hotchpot clause may fail as being conditional on a circumstance which has not come to pass: *Nugee v Chapman* (1860) 29 Beav 288.

4 As to divesting provisions generally see PARAS 726-730 post.

5 Thus even where the person directed to account has obtained a benefit, the clause is not extended to advances to persons other than those contemplated by the clause: *M'Clure v Evans* (1861) 29 Beav 422 (husband of legatee). See also *White v Turner* (1858) 25 Beav 505. As to advances to a married woman legatee during coverture under the law before the Married Women's Property Act 1882 see *Douglas v Willes* (1849) 7 Hare 318 (assignees of legatee, under assignment before advance); *Silverside v Silverside* (1858) 25 Beav 340 (children of legatee); *Poole v Poole* (1871) 7 Ch App 17 at 19; *Hewitt v Jardine* (1872) LR 14 Eq 58; *Re Haygarth, Wickham v Haygarth* [1913] 2 Ch 9.

6 *Re Warde, Warde v Ridgway* (1914) 111 LT 35; *Re Young, Young v Young* [1914] 1 Ch 581 (affd [1914] 1 Ch 976, CA); *Re Barker, Gilbey v Barker* [1918] 1 Ch 128.

7 *Stewart v Stewart* (1880) 15 ChD 539. See also *Meinertzen v Walters* (1872) 7 Ch App 670, CA.

8 *Re Jaques, Hodgson v Braisby* [1903] 1 Ch 267 at 274, CA. 'Advances' may thus include sums which as debts have become statute-barred (*Poole v Poole* (1871) 7 Ch App 17), or the balance of a debt after deducting the dividends received by the testator in the legatee's bankruptcy (*Auster v Powell* (1863) 1 De GJ & Sm 99; *Re Ainsworth, Millington v Ainsworth* [1922] 1 Ch 22). Where, however, the clause directs hotchpot, not of the sums advanced, but of the debts owing, the effect of a composition or bankruptcy (*Golds v Greenfield* (1854) 2 Sm & G 476) or of the statutes of limitation (*Re Jolly, Gathercole v Norfolk* [1900] 2 Ch 616, CA) is to render the clause inoperative as to those debts.

9 *Auster v Powell* (1863) 1 De GJ & Sm 99; *Re Whitehouse, Whitehouse v Edwards* (1887) 37 ChD 683.

10 Eg a gift of leaseholds: *Douglas v Willes* (1849) 7 Hare 318; *Re Jaques, Hodgson v Braisby* [1903] 1 Ch 267. As to advances in distribution on intestacy see further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 605.

11 *Re Whiteford, Inglis v Whiteford* [1903] 1 Ch 889 (where the report of *Hilton v Hilton* (1872) LR 14 Eq 468 is corrected). The payment by the testator of a premium for a son is not an 'advancement' to be accounted for: *Re Watney, Watney v Gold* (1911) 56 Sol Jo 109 (fee paid to an architect for son to learn his business).

12 *Cooper v Cooper* (1873) 8 Ch App 813. Dicta in *Leake v Leake* (1805) 10 Ves 477, and decisions in *Onslow v Michell* (1812) 18 Ves 490, and *Goolding v Haverfield* (1824) 13 Price 593 (see also *Fazakerley v Gillibrand* (1834) 6 Sim 591), to the effect that a provision by will is an advancement in the lifetime of the testator, were criticised in *Cooper v Cooper* supra at 825-828. For criticism of *Onslow v Michell* supra see also *Re Livesey's Settlement Trusts, Livesey v Livesey* [1953] 2 All ER 723 at 726, [1953] 1 WLR 1114 at 1117-1118 (testamentary gift mere bounty to which clause providing for sums provided for 'advancement or preferment in the world' to be taken in satisfaction pro tanto of portions did not apply). As to the extent of advancement clauses see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 73 et seq.

13 *Twisden v Twisden* (1804) 9 Ves 413 at 427.

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689. Method of bringing advances into account.

Apart from a special direction¹, there are two methods of bringing advances into account².

The first method is to value the estate at the testator's death³, if the will shows that he contemplated immediate division, or at the time fixed by the will for distribution⁴ if, for example, there is a prior life interest⁵; to that value is added for computation the amount of the advances; the total is then divided into the required number of shares and the advances are deducted from the advanced beneficiaries' shares respectively. The income is then divided on the footing that these shares represent the shares of the persons interested in the residuary estate⁶.

The second method⁷ is to defer the valuation until the period of actual distribution⁸. Meanwhile to the actual income of the estate there is added for the purpose of computation a sum for interest on the amount of the advances⁹. The income thus notionally arrived at is divided into the required number of shares, and interest¹⁰ on the advances is deducted from the shares of that income of the advanced beneficiaries respectively¹¹. When the time for distribution of the capital arrives, the amount of the advances is added to the sum actually in hand to be divided; the total is then divided between beneficiaries and the beneficiaries are debited with their advances¹². The second method has been adopted where, from the nature of the estate or a substantial part of it, it is not practicable to make a fair and proper valuation at the time fixed for distribution¹³, or where it appears from the will as a whole that the testator did not contemplate that there would in fact be an actual distribution at that time¹⁴; and it seems that this is the rule which should be generally adopted¹⁵. It appears, however, that each donee bears a share of any annuities charged on the estate, according to his aliquot share as determined by the will apart from hotchpot¹⁶.

1 See *Re Willoughby, Willoughby v Decies* [1911] 2 Ch 581 at 594, 600, 602, CA (where a direction securing equality of portions was held to refer only to capital).

2 See *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542 at 549, [1962] 1 WLR 496 at 507 per Cross J (where the court considered that it was free to decide to adopt whichever of the two methods seemed the more appropriate). See also *Re Dallmeyer, Dallmeyer v Dallmeyer* [1896] 1 Ch 372 at 386, CA.

3 See *Re Mansel, Smith v Mansel* [1930] 1 Ch 352 at 355-356, 362; *Re Gunther's Will Trusts, Alexander v Gunther* [1939] Ch 985, [1939] 3 All ER 291. See also *Re Oram, Oram v Oram* [1940] Ch 1001, [1940] 4 All ER 161.

4 Ie whether at the testator's death (*Hilton v Hilton* (1872) LR 14 Eq 468; *Field v Seward* (1877) 5 ChD 538 at 539; *Re Lambert, Middleton v Moore* [1897] 2 Ch 169; *Re Whiteford, Inglis v Whiteford* [1903] 1 Ch 889) or other later time (*Andrewes v George* (1830) 3 Sim 393 at 394; *Re Rees, Rees v George* (1881) 17 ChD 701; *Re Dallmeyer, Dallmeyer v Dallmeyer* [1896] 1 Ch 372, CA). The effect of a charge on the fund, such as a life

annuity secured by a part of the fund being set apart to meet it, does not alter the period for distribution for this purpose: *Re Whiteford, Inglis v Whiteford* supra; *Re Willoughby, Willoughby v Decies* [1911] 2 Ch 581 at 597, CA. Settled funds must be brought into hotchpot at the value at the date of the settlement: *Re Crocker, Crocker v Crocker* [1916] 1 Ch 25.

5 Eg as in *Re Rees, Rees v George* (1881) 17 ChD 701. See also *Re Dallmeyer, Dallmeyer v Dallmeyer* [1896] 1 Ch 372 at 393-394, CA.

6 *Re Hargreaves, Hargreaves v Hargreaves* (1903) 88 LT 100, CA; *Re Gilbert, Gilbert v Gilbert* [1908] WN 63; *Re Hart, Hart v Arnold* (1912) 107 LT 759; *Re Mansel, Smith v Mansel* [1930] 1 Ch 352.

7 This method was adopted in *Re Wills, Dulverton v Macleod* [1939] Ch 705, [1939] 2 All ER 775 (income), *Re Hillas-Drake, National Provincial Bank Ltd v Liddell* [1944] Ch 235, [1944] 1 All ER 375 (capital), and *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542, [1962] 1 WLR 496.

8 See *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542, [1962] 1 WLR 496.

9 *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542, [1962] 1 WLR 496.

10 Under neither method is interest charged up to the testator's death (*Re Willoughby, Willoughby v Decies* [1911] 2 Ch 581, CA; and see *Re Whiteford, Inglis v Whiteford* [1903] 1 Ch 889), or other time fixed for distribution (*Re Dallmeyer, Dallmeyer v Dallmeyer* [1896] 1 Ch 372, CA; *Re Willoughby, Willoughby v Decies* supra; *Re Forster-Brown, Barry v Forster-Brown* [1914] 2 Ch 584). Interest, however, runs from that time to the date of actual distribution: *Re Dallmeyer, Dallmeyer v Dallmeyer* supra. The rate of interest has usually been 4% per annum when that was the rate of interest laid down by court rules for an account of legacies directed by judgment: *Re Davy, Hollingsworth v Davy* [1908] 1 Ch 61, CA (approving in this respect *Stewart v Stewart* (1880) 15 ChD 539, *Re Rees, Rees v George* (1881) 17 ChD 701 and *Re Hargreaves, Hargreaves v Hargreaves* (1902) 86 LT 43 (varied on appeal (1903) 88 LT 100, CA, where calculation of interest was held unnecessary); and disapproving in this respect *Re Lambert, Middleton v Moore* [1897] 2 Ch 169 and *Re Whiteford, Inglis v Whiteford* supra); *Re Cooke, Randall v Cooke* [1916] 1 Ch 480. The rate of interest applicable to an account of legacies directed by judgment is currently the basic rate payable for the time being on funds in court, which is currently 4%: *Practice Direction-Accounts, Inquiries etc* PD 40 para 15. As to the CPR see CIVIL PROCEDURE vol 11 (2009) PARA 30 et seq.

11 *Re Mansel, Smith v Mansel* [1930] 1 Ch 352; *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542, [1962] 1 WLR 496. As to deducting income tax see *Re Foster, Hunt v Foster* [1920] 1 Ch 391.

12 See *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542 at 549, [1962] 1 WLR 496 at 506-507 per Cross J. This case illustrates the second method being applied where the problem was complicated by the existence of several funds and the incidence of legacy duty and estate duty.

13 *Re Craven, Watson v Craven* [1914] 1 Ch 358; *Re Forster-Brown, Barry v Forster-Brown* [1914] 2 Ch 584; *Re Cooke, Randall v Cooke* [1916] 1 Ch 480. See also *Re Tod, Bradshaw v Turner* [1916] 1 Ch 567, discussing the decision in *Re Hargreaves, Hargreaves v Hargreaves* (1903) 88 LT 100, CA. The second method was applied in *Re Rees, Rees v George* (1881) 17 ChD 701, but without noting the distinction between the two methods.

14 *Re Poyser, Landon v Poyser* [1908] 1 Ch 828.

15 *Re Wills, Dulverton v Macleod* [1939] Ch 705 (where the subject was reviewed by Simonds J); *Re Hillas-Drake, National Provincial Bank Ltd v Liddell* [1944] Ch 235, [1944] 1 All ER 375 (not following *Re Gunther's Will Trusts, Alexander v Gunther* [1939] Ch 985, [1939] 3 All ER 291, and *Re Oram, Oram v Oram* [1940] Ch 1001, [1940] 4 All ER 161, as contrary to previous practice); *Re Slee, Midland Bank Executor and Trustee Co Ltd v Slee* [1962] 1 All ER 542, [1962] 1 WLR 496 (not adopting the method followed in *Re Mansel, Smith v Mansel* [1930] 1 Ch 352).

16 *Re Hargreaves, Hargreaves v Hargreaves* (1903) 88 LT 100, CA. In *Re Poyser, Landon v Poyser* (1908) as reported in 99 LT 50, Warrington J at 53 thought that there must have been some slip in *Re Hargreaves, Hargreaves v Hargreaves* supra in drawing up the order or otherwise with regard to this point. The rule is, however, regarded as 'undoubted' in *Re Hargreaves, Hargreaves v Hargreaves* supra at 101 per Romer LJ.

690. Advances recited.

Where a testator states by recital in his will the sum advanced, a mistake in amount cannot be corrected if the hotchpot clause clearly directs hotchpot of the sum recited to have been advanced¹; but if the clause directs hotchpot of that sum, or so much of it as remains unpaid, the intention is inferred that only the amount actually owing is to be brought into account, and the mistake may be corrected².

The testator may refer to non-testamentary documents, even those made subsequent to the date of his will; such documents may be referred to as evidence of the advances made³, but may not be used for the purpose of varying the terms of the will⁴.

1 *Re Wood, Ward v Wood* (1886) 32 ChD 517.

2 *Re Taylor's Estate, Tomlin v Underhay* (1882) 22 ChD 495 at 500, CA; *Re Kelsey, Woolley v Kelsey, Kelsey v Kelsey* [1905] 2 Ch 465 at 470 (not following *Re Aird's Estate, Aird v Quick* (1879) 12 ChD 291).

3 *Whateley v Spooner* (1857) 3 K & J 542. In *Smith v Conder* (1878) 9 ChD 170 and *Re Coyte, Coyte v Coyte* (1887) 56 LT 510, it was said that subsequent unattested letters or entries in a book could not be referred to, on account of the Wills Act 1837. It appears, however, that this is so only for the purpose of admitting them to probate. In *Quihampton v Going* (1876) 24 WR 917, the entries were made previously to the date of the will. See also *Kirk v Eddowes* (1844) 3 Hare 509 at 518 (testator's declarations at time of advance, made after date of will). In *Re Deprez, Henriques v Deprez* [1917] 1 Ch 24, however, where there was a direction in a codicil that advances appearing in the testator's books of account should be brought into hotchpot, entries after the date of the codicil were not receivable as evidence of advances.

4 *Whateley v Spooner* (1857) 3 K & J 542; *Smith v Conder* (1878) 9 ChD 170.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(i) In general/691. Clarity and effect.

(4) CONDITIONAL GIFTS

(i) In general

691. Clarity and effect.

Where a testator has by any means¹ clearly attached conditions² or obligations to his gifts, his expressed intention is paramount. Where, however, the will is not clear, it is a settled rule of construction that words are not construed as importing a condition (particularly a condition of forfeiture) if they are fairly capable of another interpretation³.

Words expressing a condition may be treated as being words of limitation⁴ or as creating merely a trust⁵ or charge⁶. A gift on condition that the donee makes certain payments for the benefit of other persons⁷ or a gift subject to such payments⁸ is generally construed as constituting those payments a charge on the property given where, in the circumstances existing at the date of the will, some surplus could remain out of the property after making the payments⁹, and as constituting the donee a trustee of the property where no substantial surplus could remain after making the payments at the date of the will¹⁰. When the surplus is appropriated to a purpose which may or may not require the whole of it to be applied, the question is one of construction of the particular will¹¹.

As in other provisions¹² in a will, words may be rejected or supplied on the natural sense of conditions varied where this is required by the context¹³, but the court does this with reluctance and words are not readily inserted which will prevent vesting¹⁴.

1 *Re Williams, Williams v Williams* [1897] 2 Ch 12 at 18, CA, per Lindley LJ. As to uncertainty in a condition see PARAS 429-432 ante.

2 As to conditions generally see PARA 419 et seq ante.

3 *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 41 per Lord Westbury. See also *Wright v Wilkin* (1860) 31 LJQB 7 (affd (1862) 31 LJQB 196, Ex Ch); *Re Gregory, How v Charrington* (1935) 52 TLR 130 (where there was a gift to a charity on condition that the charity was not subsidised by the state or by a public or local authority). As to divesting generally see PARA 726 et seq post; and as to imposing a condition when a power of appointment is exercised see *Re Neave, Neave v Neave* [1938] Ch 793, [1938] 3 All ER 220.

4 *Page v Hayward* (1705) 2 Salk 570; *Pelham-Clinton v Duke of Newcastle* [1902] 1 Ch 34, CA (affd [1903] AC 111, HL).

5 *Oddie v Brown* (1859) 4 De G & J 179 at 194; *Wright v Wilkin* (1860) 31 LJQB 7 (affd (1862) 31 LJQB 196, Ex Ch); *Re Hall* (1918) 53 ILT 11. In *Re Frame, Edwards v Taylor* [1939] Ch 700, it was held that a gift on condition that the donee adopted the testator's daughter involved that the donee should receive the property on trust to provide maintenance, and this was a trust which would be enforced. In *Olszanecki v Hillocks* [2002] EWHC 1997 (Ch), [2002] All ER (D) 68 (Aug), [2004] WTLR 975, a gift of a share in a property to donees on condition that they allow another to occupy the property was held to create a trust.

6 It is a question of construction in each case whether a charge or a personal obligation is created or whether both are created: *Re Lester, Lester v Lester* [1942] Ch 324 at 325, [1942] 1 All ER 646 at 647 per Simonds J.

7 *Hodge v Churchward* (1847) 16 Sim 71; *Cunningham v Foot* (1878) 3 App Cas 974, HL; *Re Oliver, Newbald v Beckitt* (1890) 62 LT 533; *Re Hazlette* [1915] 1 IR 285, Ir CA.

8 *Hughes v Kelly* (1843) 3 Dr & War 482 (settlement); *Jacquet v Jacquet* (1859) 27 Beav 332; *Proud v Proud* (1862) 32 Beav 234; *Re Cowley, Souch v Cowley* (1885) 53 LT 494; *Re Scott, Scott v Scott (No 2)* (1915) 31 TLR 505 (devise subject to payment of pensions and allowances).

9 As to where there is a direction to pay an annuity out of the income of a fund see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 828.

10 *Wright v Wilkin* (1860) 2 B & S 232 (affd (1862) 2 B & S 259); *Bird v Harris* (1870) LR 9 Eq 204; *A-G v Wax Chandlers' Co* (1873) LR 6 HL 1; *Re Corcoran, Corcoran v O'Kane* [1913] 1 IR 1 at 7. The refusal to perform the condition or the death of the donee does not disappoint those entitled under the condition: *Re Kirk, Kirk v Kirk* (1882) 21 ChD 431, CA. The question has arisen chiefly in cases of charitable gifts of sums payable out of income: see *Thetford School Case* (1609) 8 Co Rep 130b; and CHARITIES vol 8 (2010) PARA 130 et seq.

11 *A-G v Wax Chandlers' Co* (1873) LR 6 HL 1 at 9-10.

12 As to the general principle in regard to rejecting or adding words see PARA 544 ante.

13 *Lunn v Osborne, Pruett v Osborne* (1834) 7 Sim 56. See also *Doe d Leach v Micklem* (1805) 6 East 486; *Perrin v Lyon, Lyon v Geddes* (1807) 9 East 170; *Re Lowry's Will Trusts, Barclays Bank Ltd v United Newcastle-upon-Tyne Hospitals Board of Governors* [1967] Ch 638, [1966] 3 All ER 955 (where 'as equivalent charities' was added to make sense of the words in the will). As to changing 'and' to 'or' and vice versa see PARA 728 et seq post. A condition relating to religion may be varied as respects a minor so as to enable the donee to make a considered choice: see *Re May, Eggar v May* [1917] 2 Ch 126; *Re May, Eggar v May* [1932] 1 Ch 99, CA. See also *Patton v Toronto General Trusts Corp* [1930] AC 629, PC.

14 *Walker v Mower* (1852) 16 Beav 365; *Hope v Potter* (1857) 3 K & J 206; *Re Litchfield, Horton v Jones* (1911) 104 LT 631 at 632.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(i) In general/692. Conditions attaching to a series of gifts.

692. Conditions attaching to a series of gifts.

A condition attached to the first of a series of gifts may attach only to that one or generally throughout the series¹.

In a gift expressly made 'in the same manner' as another gift, the reference may be to the conditions attached by the testator² to the mode of enjoyment only³, and not to the mode of settlement, if any, of that gift⁴, or other restrictions⁵; or the words may refer to all the interests, including gifts over, into which, under the principal gift, the absolute interest was to be divided⁶.

1 For examples where the application of a condition to several gifts was in question see *Cockrill v Pitchforth* (1845) 1 Coll 626; *Doe d Bailey v Sloggett* (1850) 5 Exch 107; *Paylor v Pegg* (1857) 24 Beav 105 (gifts commencing with 'likewise') (distinguishing *Boosey v Gardener* (1854) 5 De GM & G 122); *Gordon v Gordon* (1871) LR 5 HL 254; *Rhodes v Rhodes* (1882) 7 App Cas 192 at 209, PC; *Re M'Garrrity, Ballance and Benson v M'Garrrity* (1912) 46 ILT 175. For examples where the question of vesting is concerned see PARA 701 post.

2 The true rule of construction is not to look out for any conditions which may be affixed by law to the donees' interests, but to give effect, as far as possible, to the words of the will: *Ord v Ord* (1866) LR 2 Eq 393 at 396.

3 Eg the separate use (*Shanley v Baker* (1799) 4 Ves 732), or tenancy in common (*Lumley v Robbins* (1853) 10 Hare 621 at 629; *Re Wilder's Trusts* (1859) 27 Beav 418), or condition as to marriage, if valid (*Younge v Furse* (1857) 8 De GM & G 756), attached to the gift referred to.

4 *Eames v Anstee* (1863) 33 Beav 264 at 267; *Re Green, Crowson v Wild* [1907] VLR 284.

5 Eg a restriction on the class of persons taking may not be imported: *Yardley v Yardley* (1858) 26 Beav 38; *Pigott v Wilder* (1858) 26 Beav 90; *Re Wilder's Trusts* (1859) 27 Beav 418. See, however, *Swift v Swift* (1863) 32 LJ Ch 479.

6 *Ross v Ross* (1845) 2 Coll 269 at 272 per Knight Bruce V-C; *Re Liverpool Dock Acts, Re Colthead's Will Trusts* (1852) 2 De G & J 690; *Auldjo v Wallace* (1862) 31 Beav 193; *Re Shirley's Trusts* (1863) 32 Beav 394; *Ord v Ord* (1866) LR 2 Eq 393. See also *Milsom v Awdry* (1800) 5 Ves 465 at 467. There is no inflexible rule on the subject: *Pigott v Wilder* (1858) 26 Beav 90. As to the multiplication of charges in gifts by reference see SETTLEMENTS vol 42 (Reissue) PARA 723.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(i) In general/693. Cumulative and substituted legacies.

693. Cumulative and substituted legacies.

Legacies given expressly¹ or impliedly² in addition to or in substitution for a legacy previously given so as to vary the amount of that legacy³ are prima facie subject to the like conditions, if any, as are imposed on the original legacy⁴ in respect of the mode of enjoyment of that legacy⁵. The context or the circumstances may, however, exclude this rule⁶, and it does not apply, unless the context so requires⁷, where its application would alter the interests in the property⁸, or where the character of the gifts is entirely different⁹, or, in general, where the legatee of a substituted legacy is not the same as the legatee of the original legacy¹⁰, although it may apply in this case¹¹.

1 The rule applies especially to cases of an express declaration, the presumption being that the testator merely intended to alter the amount of the legacy: *Re Boden, Boden v Boden* [1907] 1 Ch 132 at 149-150, CA. As to whether a gift is cumulative or substituted see PARA 685 et seq ante.

2 *Johnstone v Earl of Harrowby* (1859) 1 De GF & J 183. See, however, *Re Boden, Boden v Boden* [1907] 1 Ch 132 at 149-150.

3 It seems that the rule is not confined to questions of amount and may apply to cases where the substituted legatee is different from the original legatee: *Re Backhouse, Salmon v Backhouse* [1916] 1 Ch 65. See also *Re Joseph, Pain v Joseph* [1908] 2 Ch 507 at 512, CA, per Farwell LJ. In *Barry v Crundall* (1835) 7 Sim 430, trustees only were changed, and there was no change in the beneficial interest, notwithstanding an imperfect allusion to the original gift. See also *Fenton v Farington* (1856) 2 Jur NS 1120.

4 *Leacroft v Maynard* (1791) 3 Bro CC 233 (charged on same fund); *Crowder v Clowes* (1794) 2 Ves 449 (raisable out of same property); *Cooper v Day* (1817) 3 Mer 154; *Earl of Shaftesbury v Duke of Marlborough* (1835) 7 Sim 237 (cases as to legacy duty); *Martin v Drinkwater* (1840) 2 Beav 215; *Day v Croft* (1842) 4 Beav 561 (separate use); *Bristow v Bristow* (1842) 5 Beav 289 (charged on same fund); *Warwick v Hawkins* (1852) 5 De G & Sm 481 (separate use); *Giesler v Jones* (1858) 25 Beav 418 (payment postponed to death of life tenant of original legacy); *Duncan v Duncan (No 2)* (1859) 25 Beav 392 (provision for increase not applying to original legacy); *Duffield v Currie* (1860) 29 Beav 284 (same time of payment); *Re Smith* (1862) 2 John & H 594 at 600 (determination on insolvency); *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685, CA (condition as to widowhood); *Re Benyon, Benyon v Grieve* (1884) 51 LT 116 (condition as to remaining in testator's service); *Re Colyer, Millikin v Snelling* (1886) 55 LT 344 (payment deferred to death of life tenant of original legacy); *Re Boden, Boden v Boden* [1907] 1 Ch 132, CA (annuities charged alike on income alone); *Re Crichton's Settlement, Sweetman v Batty* (1912) 106 LT 588 (limitation of gift during spinsterhood). As to cases where one legacy was given free of legacy duty (now abolished: see INHERITANCE TAXATION vol 24 (Reissue) PARA 401) cf *Burrows v Cottrell* (1830) 3 Sim 375; *Re Boden, Boden v Boden* supra at 150 per Fletcher Moulton LJ. See also *Johnstone v Earl of Harrowby* (1859) 1 De GF & J 183 at 191 (legacy out of same fund, free of legacy duty). As to conditions attaching to alternate gifts, whether original or substitutional, see PARA 616 ante.

5 Prima facie, conditions as to the mode of settlement are not imported; the rule may in general be applied where the original legacy is given absolutely or subject to defeasance but not in other cases: *Re Mores' Trust* (1851) 10 Hare 171 at 176 per Turner V-C; *Mann v Fuller* (1854) Kay 624 at 626 per Wood V-C; *Cooney v Nicholls* (1881) 7 LR Ir 107 at 115, Ir CA (cases where the original legacy was settled and the donee was life tenant); *Re Joseph, Pain v Joseph* [1908] 2 Ch 507 at 511, CA. See also note 1 supra.

6 *Re Mores' Trust* (1851) 10 Hare 171. See also *Overend v Gurney* (1834) 7 Sim 128; *Goodman v Goodman* (1847) 1 De G & Sm 695; *King v Tootel* (1858) 25 Beav 23.

7 See *Re Freme's Contract* [1895] 2 Ch 778, CA.

8 *Alexander v Alexander* (1842) 5 Beav 518; *Re Mores' Trust* (1851) 10 Hare 171 at 176; *Re Gibson's Trusts* (1861) 2 John & H 656 at 673; *Hargreaves v Pennington* (1864) 34 LJ Ch 180; *Hill v Jones* (1868) 37 LJ Ch 465; *Re Joseph, Pain v Joseph* [1908] 2 Ch 507 at 511, CA. In *Cookson v Hancock* (1836) 2 My & Cr 606, the trusts of the original legacy attached to the substituted legacy in the context of the will and codicil.

9 *Alexander v Alexander* (1842) 5 Beav 518 (pecuniary legacy substituted for residue); *Tibbs v Elliott* (1865) 34 Beav 424 (where a provision that the issue were to succeed to the parents' shares in property specifically devised did not extend to the parents' shares in residue); *Re Howe, Wilkinson v Ferniehough* (1910) 103 LT 185.

10 *Chatteris v Young* (1827) 2 Russ 183; *Haley v Bannister* (1857) 23 Beav 336; *Re Joseph, Pain v Joseph* [1908] 2 Ch 507, CA.

11 *Re Backhouse, Salmon v Backhouse* [1916] 1 Ch 65; *Re MacCarthy's Will Trusts* [1958] IR 311.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(i) In general/694. Accruer clauses.

694. Accruer clauses.

A clause of accruer which divests and disposes of the share of a donee dying before a particular time, or in particular circumstances, prima facie refers only to the original share of that donee, and does not extend to shares which have accrued under the clause¹. A similar construction applies where the description of the property subject to the clause of accruer is not necessarily comprehensive both of the donee's original share and of his other shares, or of his whole interest under the gifts in question, including the clauses of accruer²; but this construction does not apply where the clause clearly refers to the donee's whole interest in the fund³, or to a plurality of shares of a single donee⁴. The word 'share' alone, or a similar word, may also be explained by the context to mean the donee's whole interest⁵, for example by any

expression directing the accrued shares to devolve in a similar way to the original shares⁶, or by a context treating the accrued and original shares as blended, or as devolving together⁷, or by the will showing an intention to create one aggregate fund and dispose of that absolutely⁸, or by a context treating the whole property as subject to a gift over in an aggregate mass⁹.

In general, the conditions applicable to an original share are not applicable to the share accrued to it under a clause of accruer¹⁰ unless an intention that they are to apply is shown or can be inferred¹¹. In the absence of a contrary intention, an accruing share accrues to other shares in equal proportions¹².

1 *Rudge v Barker* (1735) Cas temp Talb 124; *Re Scaife, ex p West* (1784) 1 Bro CC 575; *Crowder v Stone* (1829) 3 Russ 217 at 223; *Rickett v Guillemard* (1841) 12 Sim 88; *Re Lybbe's Will Trusts, Kildahl v Bowker* [1954] 1 All ER 487, [1954] 1 WLR 573 (where it was held that there was insufficient indication to justify departure from the ordinary meaning of 'share' which meant 'original share' and did not include 'accrued share'). As to the operation of an accruer clause in relation to a share to which the doctrine of *Lassence v Tierney* (1849) 1 Mac & G 551 (see PARA 522 ante) was applied see *Re Atkinson's Will Trusts, Prescott v Child* [1957] Ch 117, [1956] 3 All ER 738.

2 *Woodward v Glasbrook* (1700) 2 Vern 388 (his part or share); *Perkins v Micklethwaite* (1714) 1 P Wms 274 (portion); *Bright v Rowe* (1834) 3 My & K 316 (her, his or their portion or portions); *Rickett v Guillemard* (1841) 12 Sim 88 (his, her or their shares); *Jones v Hall* (1849) 16 Sim 500 (his share and portion); *Maddison v Chapman* (1858) 4 K & J 709 at 716 (the part of the deceased); *Goodwin v Finlayson* (1858) 25 Beav 65 (his or her part); *Evans v Evans* (1858) 25 Beav 81 at 88 (his or her share). There has been adverse criticism of *Pain v Benson* (1744) 3 Atk 78 (his, her or their shares), and it has not been followed: *Goodwin v Finlayson* supra. A description of the property subject to the clause of accruer in terms such as 'his, her or their share or shares' may be read as if 'shares' corresponded to 'their', and, therefore, as not denoting a plurality of the shares of a single donee: *Bright v Rowe* (1834) 3 My & K 316; *Rickett v Guillemard* (1841) 12 Sim 88; *Wilmot v Flewitt* (1865) 11 Jur NS 820 at 821; *Sutton v Sutton* (1892) 30 LR Ir 251 at 268, Ir CA (deed); *Ganapathy Pillay v Alamaloo* [1929] AC 462, PC.

3 *Goodman v Goodman* (1847) 1 De G & Sm 695 (the interest and capital of child dying); *Douglas v Andrews* (1851) 14 Beav 347 at 353 (the part and parts, share and shares and interest of him, her or them); *Re Crawhall's Trust* (1856) 8 De GM & G 480 (with benefit of survivorship); *Re Henriques' Trusts* [1875] WN 187 (part share and interest); *Re Sadler, Furniss v Cooper* (1915) 60 Sol Jo 89; *Re Morris, Corfield v Waller* (1916) 86 LJ Ch 456.

4 *Re Chaston, Chaston v Seago* (1881) 18 ChD 218 at 224; *Clifton v Crawford* (1900) 27 AR 315 at 319.

5 *Doe d Clift v Birkhead* (1849) 4 Exch 110.

6 *Giles v Melsom* (1873) LR 6 HL 24. See also *Eyre v Marsden* (1839) 4 My & Cr 231; *Leeming v Sherratt* (1842) 2 Hare 14 at 25.

7 *Milsom v Awdry* (1800) 5 Ves 465; *Douglas v Andrews* (1851) 14 Beav 347 at 351-352. As to directions that a share of residue given under a previous gift is to fall into residue either generally or in certain events see PARA 589 ante.

8 *Re Allan, Dow v Cassaigne* [1903] 1 Ch 276 at 284, CA, per Vaughan-Williams LJ; discussed in *Re Lybbe's Will Trusts, Kildahl v Bowker* [1954] 1 All ER 487, [1954] 1 WLR 573.

9 *Worlidge v Churchill* (1792) 3 Bro CC 465; *Barker v Lea* (1823) Turn & R 413 at 415; *Eyre v Marsden* (1838) 2 Keen 564 at 575; *Sillick v Booth* (1841) 1 Y & C Ch Cas 117 at 121; *Doe d Clift v Birkhead* (1849) 4 Exch 110; *Dutton v Crowdy* (1863) 33 LJ Ch 241; *Re Henriques' Trusts* [1875] WN 187. Where a share was to accrue to the shares of daughters, the accruer was held to operate independently of survivorship of the daughters taking accruing shares: *Re Walter's Will Trusts, Stuart v Pitman* [1949] Ch 91, [1948] 2 All ER 955.

10 *Gibbons v Langdon* (1833) 6 Sim 260; *Ranelagh v Ranelagh* (1841) 4 Beav 419 (original gift for life); *Jones v Hall* (1849) 16 Sim 500; *Leigh v Mosley* (1851) 14 Beav 605 (no tenancy in common in accrued shares); *Ware v Watson* (1855) 7 De GM & G 248 (direction for settlement of daughter's share applied to original share only).

11 *Milsom v Awdry* (1800) 5 Ves 465; *Cursham v Newland* (1839) 2 Beav 145; *Re Jarman's Trusts* (1865) LR 1 Eq 71 (separate use attaching to the 'share or shares'); *Giles v Melsom* (1873) LR 6 HL 24; *Sutton v Sutton* (1892) 30 LR Ir 251 at 260, Ir CA. See also *Trickey v Trickey* (1832) 3 My & K 560 at 565; *Hayes v Hayes* [1917] 1 IR 194. References to 'separate use' in gifts to women are not relevant where the will came into operation on or after 1 January 1883.

12 See *Re Bower's Settlement Trusts*, *Bower v Ridley-Thompson* [1942] Ch 197, [1942] 1 All ER 278; *Re Steel*, *Public Trustee v Christian Aid Society* [1979] Ch 218, [1978] 2 All ER 1026. In *Re Huntington's Settlement Trusts*, *Struthers v Mayne* [1949] Ch 414, [1949] 1 All ER 674, it was held that, under an accruer clause adding accruing shares to those whose trusts had not failed or determined, a share which had vested absolutely and been paid out to a beneficiary was entitled to participate in accruing shares, since the trusts of the paid-out share had not failed or determined.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(i) In general/695. Contingency happening in testator's lifetime.

695. Contingency happening in testator's lifetime.

Whenever there is an interest validly limited by will, either by way of remainder or by way of executory interest, and all the preceding estates have failed or determined, and the events on which the interest is limited have taken effect, it is in general immaterial whether this has happened in the testator's lifetime or after his death¹. Thus in the case of a gift over on a prior named individual donee dying in any contingent circumstances², or dying before any specified time or event³, the gift over as a rule takes effect if the prior donee so dies during the testator's lifetime⁴. A gift over on a prior donee dying without having attained a vested interest takes effect if that prior donee dies in the testator's lifetime, even if he otherwise satisfies the conditions of the prior gift⁵. However, on its true construction, a will may be held to refer only to events taking place after the testator's death or other time⁶.

1 *Varley v Winn* (1856) 2 K & J 700 at 705.

2 Eg where the gift over is on death before 21 and the prior donee dies during the testator's lifetime not having attained 21 (*Ledsome v Hickman* (1708) 2 Vern 611; *Perkins v Micklethwaite* (1714) 1 P Wms 274 (death before 21 or marriage); *Northey v Strange* (1716) 1 P Wms 340 at 343; *Willing v Baine* (1731) 3 P Wms 113), or if the gift over is on death without issue (*Mackinnon v Peach* (1838) 2 Keen 555 at 560; *Varley v Winn* (1856) 2 K & J 700), or on death without issue who become entitled under an intermediate gift (*Rackham v De La Mare* (1864) 2 De GJ & Sm 74), or on death leaving issue (*Rheeder v Ower* (1791) 3 Bro CC 240).

3 Eg on death before payment (*Ive v King* (1852) 16 Beav 46 at 54), or before division of the estate (*Bretton v Lethulier* (1710) 2 Vern 653), or before the legacy becomes payable (*Darrel v Molesworth* (1700) 2 Vern 378; *Walker v Main* (1819) 1 Jac & W 1; *Humphreys v Howes* (1830) 1 Russ & M 639).

4 If, however, the prior donee dies before the testator but not before the specified event, the gift over does not normally take effect: see PARA 731 post. As to the general rule in cases of failure of a prior interest see PARA 471 ante.

5 *Re Gaitskell's Trust* (1873) LR 15 Eq 386.

6 *Chapman v Perkins* [1905] AC 106, HL.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/A. PRESUMPTION AS TO VESTING/696. Meaning of 'vest'.

(ii) Vesting

A. PRESUMPTION AS TO VESTING

696. Meaning of 'vest'.

The proper legal meaning of 'vest' is vest in interest¹. Where a testator uses this word, as, for example, by directing that the gift is to vest on a certain event, prima facie it must be given its proper legal meaning, and the gift is then contingent until the happening of the event², whether the gift is of real or personal estate³. The context may, however, show, by indications that the donee is to take a vested interest before the specified event, that 'vest' is used in another sense, for example in the sense of 'fall into possession'⁴, or 'become payable'⁵ or 'be indefeasibly vested'⁶. Where 'vested' means 'indefeasibly vested', the gift may be vested before the specified event, subject only to being divested if the event does not happen⁷. A direction with regard to vesting of a gift to a class may, on the construction of a particular will, even introduce a new category of persons to share in the gift⁸.

1 *Re Baxter's Trusts* (1864) 10 Jur NS 845 at 847; *Hale v Hale* (1876) 3 ChD 643 at 646. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1019; REAL PROPERTY vol 39(2) (Reissue) PARA 166. As to the general rule of construction of words see PARA 532 ante.

2 *Glanvill v Glanvill* (1816) 2 Mer 38; *Russel v Buchanan* (1836) 7 Sim 628; *Ring v Hardwick* (1840) 2 Beav 352; *Griffith v Blunt* (1841) 4 Beav 248; *Comport v Austen* (1841) 12 Sim 218; *Re Thruston's Will Trusts* (1849) 17 Sim 21; *Re Blakemore's Settlement* (1855) 20 Beav 214; *Re Morse's Settlement* (1855) 21 Beav 174; *Rowland v Tawney* (1858) 26 Beav 67; *Wakefield v Dyott* (1858) 4 Jur NS 1098; *Re Arnold's Estate* (1863) 33 Beav 163 at 173; *Richardson v Power* (1865) 19 CBNS 780, Ex Ch; *Lushington v Penrice*, *Penrice v Lushington* (1868) 18 LT 597; *Creeth v Wilson* (1882) 9 LR Ir 216 at 223; *Re Whiston*, *Whiston v Woolley* [1924] 1 Ch 122, CA. See also *Re Wrightson*, *Battie-Wrightson v Thomas* [1904] 2 Ch 95, CA (where the testator drew a distinction between vesting and falling into possession); *Parkes (or Keswick) v Parkes (or Keswick)* [1936] 3 All ER 653, HL. A provision for maintenance out of 'vested or expectant' shares in such a case does not alter the meaning of 'vest': *Bull v Pritchard* (1847) 5 Hare 567 at 572; *Re Thatcher's Trusts* (1859) 26 Beav 365 at 369. See also *Pickford v Brown*, *Brown v Brown* (1856) 2 K & J 426.

3 *Re Featherstone's Trusts* (1882) 22 ChD 111 at 114 per Kay J.

4 *Simpson v Peach* (1873) LR 16 Eq 208.

5 *Williams v Haythorne*, *Williams v Williams* (1871) 6 Ch App 782 at 788. For a case where a distinction was expressly drawn between vesting and payment in the will see *Ellis v Maxwell* (1841) 3 Beav 587.

6 *Berkeley v Swinburne* (1848) 16 Sim 275 at 281-282; *Taylor v Frobisher* (1852) 5 De G & Sm 191; *Poole v Bott* (1853) 11 Hare 33 at 37-38; *Barnet v Barnet* (1861) 29 Beav 239; *Re Baxter's Trusts* (1864) 10 Jur NS 845; *Re Edmondson's Estate* (1868) LR 5 Eq 389; *Re Parr's Trusts* (1871) 41 LJ Ch 170; *Armtyage v Wilkinson* (1878) 3 App Cas 355 at 372-373, PC; *Best v Williams* [1890] WN 189.

7 See the cases cited in note 6 supra. As to divesting generally see PARA 726 et seq post.

8 *Williams v Russell* (1863) 10 Jur NS 168; *Draycott v Wood* (1856) 5 WR 158; *Sheffield v Kennett* (1859) 27 Beav 207 (affd 4 De G & J 593). See also *Bickford v Chalker* (1854) 2 Drew 327 (where a direction as to vesting was rejected). As to a gift to a class on contingency generally see PARA 594 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/A. PRESUMPTION AS TO VESTING/697. Early vesting favoured.

697. Early vesting favoured.

Where there is a doubt as to the time of vesting, the presumption is in favour of the early vesting¹ of the gift and, accordingly, it vests at the testator's death² or at the earliest moment after that date which is possible in the context³, whether it is of real⁴ or personal⁵ estate. It is presumed that the testator intended the gift to be vested, subject to being divested, rather than to remain in suspense⁶. The presumption is especially applicable where the interest created is a remainder, the reason being that keeping the remainder contingent might in many

cases exclude the issue of a person intended to take in tail by the parent's dying before the remainder became vested⁷. It is also especially applicable where the donees are the children of a named person as a class⁸, and where the gift is of a residuary personal estate or residuary real and personal estate⁹.

1 The policy of the law favouring early vesting does not justify a contingent gift being misconstrued to make it vest earlier than the time contemplated by the testator: *Re Ransome's Will Trusts, Moberley v Ransome* [1957] Ch 348 at 361, [1957] 1 All ER 690 at 696 per Upjohn J. As to the rules of convenience, which rest on the policy favouring early vesting see PARA 596 et seq ante.

2 A bequest making no reference to time takes effect at the testator's death unless this date would disturb provisions already made in the will, or unless an intention that the bequest is to operate at a later date clearly appears: *Hamilton v Ritchie* [1894] AC 310, HL; *Bernard v Walker* (1921) 55 ILT 73, HL.

3 *Re Blakemore's Settlement* (1855) 20 Beav 214 at 217; *Darley v Perceval* [1900] 1 IR 129 at 135-136; *Ward v Brown* [1916] 2 AC 121, PC. As a will is ambulatory until death (see PARA 302 ante), the testator cannot make a legacy vest at the date of the will, and a provision to that effect does not prevent lapse: *Browne v Hope* (1872) LR 14 Eq 343. For the meaning of 'lapse' see PARA 450 ante.

4 *Driver d Frank v Frank* (1818) 8 Taunt 468, Ex Ch; *Duffield v Duffield* (1829) 3 Bli NS 260 at 311, 331, HL; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95 at 103, CA; *Re Blackwell, Blackwell v Blackwell* [1926] Ch 223 at 233-234, CA; *Bickersteth v Shanu* [1936] AC 290, [1936] 1 All ER 227, PC.

5 *Brocklebank v Johnson* (1855) 20 Beav 205 at 215; *Re Merricks' Trusts* (1866) LR 1 Eq 551 at 557; *Rhodes v Rhodes* (1882) 7 App Cas 192 at 211, PC; *Parkes (or Keswick) v Parkes (or Keswick)* [1936] 3 All ER 653, HL.

6 *Taylor v Graham* (1878) 3 App Cas 1287 at 1297, HL, per Lord Blackburn; *Hickling v Fair* [1899] AC 15 at 30, 36, HL; *Re Grove, Public Trustee v Dixon* [1919] 1 Ch 249; *Yule's Trustees v Deans* 1919 SC 570.

7 *Driver d Frank v Frank* (1814) 3 M & S 25 at 36 (affd (1818) 8 Taunt 468, Ex Ch), following *Doe d Comberbach v Perryn* (1789) 3 Term Rep 484 at 494. See also *Ives v Legge* (1743) 3 Term Rep 448n; *Re Watkins, Maybery v Lightfoot* (1913), as reported in 108 LT 237 at 240, CA, per Buckley LJ, who dissented, and whose decision was upheld on appeal sub nom *Lightfoot v Maybery* [1914] AC 782, HL. As to remainders in general see REAL PROPERTY vol 39(2) (Reissue) PARA 167 et seq. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

8 *M'Lachlan v Taitt* (1860) 2 De GF & J 449 at 454 per Lord Campbell LC; *Selby v Whittaker* (1877) 6 ChD 239 at 249, CA, per James LJ, and at 251 per Cotton LJ. There may be no reason for the application of the presumption in the case of a child if all the testator's descendants living at the period of distribution are provided for: *Re Deighton's Settled Estates* (1876) 2 ChD 783, CA.

9 *Love v l'Estrange* (1727) 5 Bro Parl Cas 59; *Booth v Booth* (1799) 4 Ves 399; *Oddie v Brown* (1859) 4 De G & J 179 at 194; *Pearman v Pearman* (1864) 33 Beav 394 at 396; *West v West* (1863) 4 Giff 198. As to gifts carrying the intermediate interest see PARA 714 et seq post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/A. PRESUMPTION AS TO VESTING/698. Whether condition is precedent or subsequent.

698. Whether condition is precedent or subsequent.

The presumption in favour of early vesting¹ may assist in determining whether a condition is to be construed as precedent or subsequent². On the construction of the particular will it may be plain that a condition is or is not a condition precedent³, and the same condition may in one case be precedent and in another be subsequent⁴. In the first instance the context of the whole will must be considered⁵, but, if on construction it is doubtful whether the condition is precedent or subsequent, the presumption in favour of early vesting applies⁶ and the condition is treated as subsequent⁷.

1 As to the presumption in favour of early vesting see PARA 697 ante.

2 See *Re Lowry's Will Trusts*, *Barclays Bank Ltd v United Newcastle-upon-Tyne Hospitals Board of Governors* [1967] Ch 638, [1966] 3 All ER 955 (where interests conferred on three charities were held to be future contingent interests and not vested interests in remainder liable to be divested by an event occurring before they vested in possession).

3 Eg 'provided A marry B', which is clearly a condition precedent: *Davis v Angel* (1862) 4 De GF & J 524; *Fitzgerald v Ryan* [1899] 2 IR 637 at 647, 663, Ir CA; *Kiersey v Flahavan* [1905] 1 IR 45. See also *Re Welstead* (1858) 25 Beav 612 (bequest for purchase of nomination); *Re Emson, Grain v Grain* (1905) 93 LT 104 ('subject to' trustees being appointed as governors). As to the meaning of and distinction between conditions precedent and conditions subsequent see PARA 420 ante.

4 *Robinson v Comyns* (1736) Cas temp Talb 164 at 166; *Doe d Planner v Scuddamore* (1800) 2 Bos & P 289 at 295 per Lord Eldon CJ, and at 297 per Heath J (where it was held that a condition is to be construed as precedent or subsequent according to the testator's intention); *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 157, 183; *Re Kavanagh*, *Murphy v Broder* (1874) IR 9 CL 123 at 130. It has been suggested that a condition is likely to be a condition precedent, eg where the condition involves anything in the nature of consideration (*Acherley v Vernon* (1739) Willes 153 per Willes CJ), such as a release of dower (*Wheddon v Oxenham* (1731) 2 Eq Cas Abr 546 pl 24), or where the nature of the interest is such as to allow time for the performance of the act before enjoyment, or where the condition is capable of being performed instantly (Jarman on Wills (8th Edn) 1459). These suggestions are considered in *Fitzgerald v Ryan* [1899] 2 IR 637 at 646-647. For cases where the allowance of a period of time for the performance of the condition, extending to the life of the donee, did not prevent the condition being precedent see also *Randal v Payne* (1779) 1 Bro CC 55; *Re M'Mahon, M'Mahon v M'Mahon* [1901] 1 IR 489, CA; *Horrigan v Horrigan* [1904] 1 IR 29 (on appeal [1904] 1 IR 271, Ir CA); *Kiersey v Flahavan* [1905] 1 IR 45 (cases of devises conditional on marriage with a named person or into a named family).

5 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 132, 157; cf *Carlton v Thompson* (1867) LR 1 Sc & Div 232 at 235, HL.

6 It applies only where the matter is not clear: *Hickling v Fair* [1899] AC 15 at 27, HL.

7 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 157, 182-183, 189; *Woodhouse v Herrick* (1855) 1 K & J 352 at 359-360; *Lady Langdale v Briggs* (1856) 8 De GM & G 391; *Re Greenwood*, *Goodhart v Woodhead* [1903] 1 Ch 749 at 755, CA; *Re Blackwell*, *Blackwell v Blackwell* [1926] Ch 223; *Bickersteth v Shanu* [1936] AC 290, [1936] 1 All ER 227, PC; *Sifton v Sifton* [1938] AC 656, [1938] 3 All ER 435, PC.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/B. CIRCUMSTANCES AFFECTING VESTING/699. Postponement of enjoyment only.

B. CIRCUMSTANCES AFFECTING VESTING

699. Postponement of enjoyment only.

In addition to the general presumption in favour of early vesting¹, particular circumstances may affect the question whether a gift is vested. Thus where a condition can be fairly read as postponing merely the right of possession or of obtaining payment, transfer or conveyance, so that there is an express or implied distinction between the time of vesting and time of enjoyment, the gift is held to be vested at the earlier date if the rest of the context allows². This construction is particularly applicable where the postponement is for the convenience of the testator's estate³ or is occasioned by the gift of some prior interest filling up the interval⁴.

Thus where the testator suspends the enjoyment until payment of his debts⁵ or other incident of administration of his estate⁶, prima facie the vesting is not suspended until that payment or other event; the nature of the provision shows that it is merely the enjoyment which is postponed. There may, however, be an intention clearly expressed⁷ to suspend vesting until such an event⁸, and effect must be given to this intention, however inconvenient the result may

be⁹. Similarly, although vesting of a legacy (whether pecuniary or residuary) may be postponed until actual payment if the context is clear¹⁰, in case of doubt the court interprets a gift apparently vesting on payment as vesting when the legacy becomes payable¹¹.

1 As to the presumption in favour of early vesting see PARA 697 ante.

2 As to real estate see *Montgomerie v Woodley* (1800) 5 Ves 522 at 526; *Bingley v Broadhead* (1803) 8 Ves 415; *Duffield v Duffield* (1829) 1 Dow & CI 268 at 311, HL, per Best CJ; *Snow v Poulden* (1836) 1 Keen 186; *Peard v Kekewich* (1852) 15 Beav 166 at 171; *Dennis v Frend* (1863) 14 I Ch R 271 (donee 'not to become entitled to or take the estate' until 23). See also *Boraston's Case* (1587) 3 Co Rep 16a, 19; and PARA 703 post. As to personal estate see *Dodson v Hay* (1791) 3 Bro CC 405 at 410; *Re Panter, Panter-Downs v Bally* (1906) 22 TLR 431; and PARAS 709-710 post. As to a mixed fund see *M'Lachlan v Taitt* (1860) 2 De GF & J 449 (where the children became beneficially interested on the death of the parent). Cf *Re McGeorge, Ratcliff v McGeorge* [1963] Ch 544, [1963] 1 All ER 519 (where a separate devise and bequest were directed not to 'take effect until after the death of my wife', and it was held that this direction deferred the vesting in possession (but not its vesting in interest) until the death of the testator's widow).

3 See the text and notes 5-6 infra. As to legacies payable out of personal estate see PARA 709 post; and as to legacies charged on real estate see PARA 724 post.

4 See PARAS 706, 713, 726 post.

5 *Barnardiston v Carter* (1717) 3 Bro Parl Cas 64; *Tewart v Lawson* (1874) LR 18 Eq 490. See also *Marshall v Holloway* (1820) 2 Swan 432 at 446 per Lord Eldon LC; *Bacon v Proctor* (1822) Turn & R 31 at 40.

6 Eg investment as directed (*Sitwell v Bernard* (1801) 6 Ves 520) or performance of trusts (*Birds v Askey* (1857) 24 Beav 615). A trust for sale of real estate, and for payment of the proceeds to certain donees, ascertained without reference to the time or other features of the sale, the sale being merely for the purpose of division and for the convenience of the estate, does not make the sale a condition precedent to vesting of their interests: *Parker v Sowerby* (1853) 1 Drew 488 (affd on another point (1854) 4 De GM & G 321). See also *Re Raw, Morris v Griffiths* (1884) 26 ChD 601 at 602. As to the effect of trusts for sale void for remoteness see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1034; and as to the rules applicable to gifts of the proceeds of sale of real estate see PARA 709 post. Since 1 January 1997 all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share now has an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

7 In such a case the court does not allow the legatees to be prejudiced by the delay of the executors or trustees: *Small v Wing* (1730) 5 Bro Parl Cas 66; *Gaskell v Harman* (1805) 11 Ves 489; *Bernard v Montague* (1816) 1 Mer 422; *Astley v Earl of Essex* (1871) 6 Ch App 898.

8 Eg until payment of debts or discharge of incumbrances (*Bagshaw v Spencer* (1748) 1 Ves Sen 142 at 144; *Bernard v Mountague* (1816) 1 Mer 422; *Tewart v Lawson* (1874) LR 18 Eq 490 at 495; *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116), or until sale or getting in of the estate (*Elwin v Elwin* (1803) 8 Ves 547 (to named persons, if living at time of sale)); *Blight v Hartnoll* (1881) 19 ChD 294 (to class of grandchildren living at time of sale)).

9 *Gaskell v Harman* (1801) 6 Ves 159; on appeal (1805) 11 Ves 489 at 497.

10 *Gaskell v Harman* (1801) 6 Ves 159; on appeal (1805) 11 Ves 489 at 497.

11 *Stapleton v Palmer* (1794) 4 Bro CC 490; *Gaskell v Harman* (1801) 6 Ves 159; *Re Kirkley, Halligey v Kirkley* (1918) 87 LJ Ch 247. As to gifts over on death before payment cf para 737 post.

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700. Contingency in description of donee or subject matter of gift.

An estate or interest must remain contingent until there is a person having all the qualifications which the testator requires and completely answering the description of the object of his bounty given in the will¹. Where the postponement of the gift is on account of some qualification attached to the donee, the gift is prima facie contingent on his qualification being acquired². Thus a gift to a person 'at', 'if', 'as soon as', 'when' or 'provided' he attains a certain age, without further context to govern the meaning of the words, is contingent and vests only on the attainment³ of the required age⁴, this being a quality or description which the donee must in general possess in order to claim under the gift⁵. In a similar gift to a class⁶, the specified age in general determines the persons who may claim as members of the class⁷. Such words have, however, in various contexts been held not really to import contingency in the sense of a condition precedent to the vesting, but to have the effect of a proviso or condition subsequent operating as a defeasance of a vested interest⁸.

1 *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358 (the first son of A that should be bred a clergyman); *Leake v Robinson* (1817) 2 Mer 363 at 385; *Duffield v Duffield* (1829) 1 Dow & Cl 268 at 311, HL, per Best CJ (such children as should attain 21) (following *Stephens v Stephens* (1736) Cas temp Talb 228 (such son as should attain 21)); *Re Laing, Laing v Morrison* [1912] 2 Ch 386 at 392; *Re Astor, Astor v Astor* [1922] 1 Ch 364, CA; *Re Lowry's Will Trusts, Barclays Bank Ltd v United Newcastle-upon-Tyne Hospitals Board of Governors* [1967] Ch 638, [1966] 3 All ER 995 (where, on the failure of certain trusts, there was a gift to such specified charities as should then remain as independent charities). As to the ascertainment of the donee see the rules stated in PARA 590 et seq ante, which may determine the vesting (see *Driver d Frank v Frank* (1818) 8 Taunt 468, Ex Ch (remainders to second and other sons, vested as they came into existence)).

2 As to persons 'living' at a particular time see *Cooper v Macdonald* (1873) LR 16 Eq 258 (where 'then living' was held to mean 'who or whose issue may then be living'; cf para 606 et seq ante); and PARA 591 ante. As to gifts to survivors see *Jones v Davies* (1880) 28 WR 455 (where the testator gave all his real and personal estate to his two sons and daughter in equal shares absolutely, and, if his daughter should die without leaving issue, to the survivors of his sons, and it was held that the survival of the sons was part of the contingency raising the gifts over, and, therefore, the sons having predeceased the daughter, the daughter's estate became indefeasible, although she died without leaving issue). As to survivorship generally see PARA 606 et seq ante. A gift to a survivor itself imports a contingency: *Whitby v Von Luedecke* [1906] 1 Ch 783; *Re Legh's Settlement Trusts, Public Trustee v Legh* [1938] Ch 39, [1937] 3 All ER 823, CA. Cf PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1022.

3 As to the time at which a person attains a particular age see the Family Law Reform Act 1969 s 9; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 2.

4 As to real estate see *Re Francis, Francis v Francis* [1905] 2 Ch 295 (following *Johnson v Gabriel and Bellamy* (1588) Cro Eliz 122, cited as *Grant's Case* in 10 Co Rep at 50a; and explained in *Lampet's Case* (1612) 10 Co Rep 46b at 50a); *Love v Love* (1881) 7 LR Ir 306 ('on his attaining' 23); *Phipps v Ackers* (1842) 9 Cl & Fin 583 at 590-591, HL, per Tindal CJ; *Doe d Wheedon v Lea* (1789) 3 Term Rep 41 at 43 per Ashurst J. As to personal estate see *Stapleton v Cheales* (1711) Prec Ch 317; Tudor, LC Real Prop (4th Edn) 438, 440; *Atkinson v Turner* (1740) 2 Atk 41; *Hanson v Graham* (1801) 6 Ves 239 at 243-245; *Butcher v Leach* (1843) 5 Beav 392; *Mair v Quilter* (1843) 2 Y & C Ch Cas 465; *Re Edwards, Jones v Jones* [1906] 1 Ch 570 at 573, CA; *Re Kirkley, Halligey v Kirkley* (1918) 87 LJ Ch 247 (where a bequest to members of a class to be paid if and when they respectively attained the age of 21 was held contingent); *Re Shurey, Savory v Shurey* [1918] 1 Ch 263; *Re Blackwell, Blackwell v Blackwell* [1926] Ch 223, CA.

5 *Leake v Robinson* (1817) 2 Mer 363 at 385-386. Where the will contains a direction to pay, transfer or assign to the donee on his attaining a specified age, the gift does not vest until that age is attained: *Walker v Mower* (1852) 16 Beav 365.

6 *Judd v Judd* (1830) 3 Sim 525; *Hunter v Judd* (1833) 4 Sim 455. Where there is a gift to a class conditional on attainment of a specified age and, if there should be only one member of the class, to him, no condition being stated, with a gift over, it depends on the terms of the gift over whether the condition attaches to the gift to the one member only: see *Walker v Mower* (1852) 16 Beav 365; *Johnson v Foulds* (1868) LR 5 Eq 268; *Re Fletcher, Doré v Fletcher* (1885) 53 LT 813.

7 As to real estate see *Duffield v Duffield* (1829) 1 Dow & Cl 268, HL; *Newman v Newman* (1839) 10 Sim 51; *Kennedy v Sedgwick* (1857) 3 K & J 540; *Re Astor, Astor v Astor* [1922] 1 Ch 364, CA. As to personal estate see *Leake v Robinson* (1817) 2 Mer 363; *Bull v Pritchard* (1826) 1 Russ 213; *Porter v Fox* (1834) 6 Sim 485 (mixed fund); *Chance v Chance* (1853) 16 Beav 572; *Merlin v Blagrove* (1858) 25 Beav 125; *Thomas v Wilberforce* (1862) 31 Beav 299; *Bowyer v West* (1871) 24 LT 414; *Re Williams, Spencer v Brighthouse* (1886) 54 LT 831. As to the ascertainment of classes see PARA 593 ante.

8 *Andrew v Andrew* (1875) 1 ChD 410 at 417, CA, per James LJ; *Re James' Settled Estates* (1884) 51 LT 596 at 597; *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239; *Bickersteth v Shanu* [1936] AC 290, [1936] 1 All ER 227, PC. Cf *Re McGeorge, Ratcliff v McGeorge* [1963] Ch 544, [1963] 1 All ER 519 (where the words 'shall not take effect until after the death of my wife' merely postponed the vesting in possession). As to the position where there is a gift over on a devise of real estate see PARA 707 post.

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701. Contingencies in successive gifts.

A contingency which is a condition precedent to vesting of a particular estate or interest prima facie applies to all interests dependent on that estate or interest or limited in immediate succession to that estate or interest as a continuous series¹, but not to other limitations². Further, even if gifts follow other gifts, and, for example, all are contingent on a certain event³, the court may infer from the will, taken as a whole, that it is a mere inaccuracy of expression, and that the contingency is really meant to apply only to such of the subsequent trusts and limitations as necessarily depend for their existence on the happening of the event in question⁴.

1 *Davis v Norton* (1726) 2 P Wms 390; *Doe d Watson v Shipphard* (1779) 1 Doug KB 75; *Toldervy v Colt* (1836) 1 Y & C Ex 621; *Cattley v Vincent* (1852) 15 Beav 198; *Paylor v Pegg* (1857) 24 Beav 105; *Hill v Hill* (1860) 8 WR 536. See also *Gray v Golding* (1860) 6 Jur NS 474, HL; *Crosse v Eldridge* (1918) 53 L Jo 52. For instances of contrary intention generally, inferred from the scope of the will see *Sheffield v Earl of Coventry* (1852) 2 De GM & G 551; *Boosey v Gardener* (1854) 5 De GM & G 122.

2 *Partridge v Foster (No 2)* (1866) 35 Beav 545.

3 *Pearson v Rutter* (1853) 3 De GM & G 398 at 406 (affd, without affecting this point, sub nom *Grey v Pearson* (1857) 6 HL Cas 61). See also *Sheffield v Earl of Coventry* (1852) 2 De GM & G 551; *Boosey v Gardener* (1854) 5 De GM & G 122; *Duffield v M'Master* [1906] 1 IR 333, Ir CA.

4 *Quicke v Leach* (1844) 13 M & W 218. See also *Napper v Sanders* (1632) Hut 118, approved in *Lethieullier v Tracy* (1753) 3 Atk 774 at 781-782 per Lord Hardwicke LC; *Horton v Whittaker* (1786) 1 Term Rep 346; *Doe d Lees v Ford* (1853) 2 E & B 970 at 974, 983; *Eaton v Hewitt* (1862) 2 Drew & Sm 184; *Re Blight, Blight v Hartnoll* (1880) 13 ChD 858.

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C. VESTING OF REMAINDERS

702. Former rule as to remainders.

Formerly it was a rule of law that a legal limitation which in its inception could operate as a remainder should do so¹, and, apart from statute², should not be allowed to operate as an executory devise. The rule did not apply to equitable limitations, and accordingly it became obsolete when future interests ceased to be capable of subsisting at law³.

1 This rule was known as the rule in *Purefoy v Rogers* (1671) 2 Wms Saund 380: see REAL PROPERTY vol 39(2) (Reissue) PARA 174. The remainder, if contingent, was liable to be destroyed if the contingency had not

happened by the time of the determination of the preceding estate: see REAL PROPERTY vol 39(2) (Reissue) PARA 171.

2 See the Contingent Remainders Act 1877 s 1 (repealed); the Real Property Act 1845 s 8 (repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 171.

3 I.e. by virtue of the Law of Property Act 1925 s 1 (as amended): see REAL PROPERTY. All future interests in land which were formerly capable of being created as legal interests are now capable of being created as equitable interests: see s 4(1). As to the rule in *Purefoy v Rogers* (1671) 2 Wms Saund 380 see *Cole v Sewell* (1843) 4 Dr & War 1 at 27; *White v Summers* [1908] 2 Ch 256; Cheshire and Burn's Modern Law of Real Property (16th Edn) p 308. As to future interests see *Pearks v Moseley* (1880) 5 App Cas 714 at 721, HL; Challis's Law of Real Property (3rd Edn) p 74 et seq, p 119 et seq, p 168 et seq; and REAL PROPERTY vol 39(2) (Reissue) PARAS 169 et seq, 173 et seq.

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703. *Boraston's Case*; *Phipps v Ackers*.

Even if it is expressed to take effect on a contingent event, a future interest may be construed to be a vested interest, taking effect in its natural order on the determination of the previous interest¹. Thus where real estate is devised to a devisee in fee when² he attains a specified age, and a prior interest is limited to endure pending his attainment of that age, the subsequent gift is vested in interest, and takes effect in possession on the attainment of that age; and, even if the devisee dies without attaining that age, the gift is not divested, but the property devolves as part of his estate³. A devise, after a prior gift for life, to a child of the life tenant or other donee if attaining a specified age is not, however, made vested merely by the fact that it is expressed to take effect 'from and after'⁴ the death of the life tenant⁵, although this expression may be of importance if there are other indications that the child's interest is vested⁶.

It is essential that a prior interest should be limited. If it is not, the rule in *Boraston's Case*⁷ does not apply and words of contingency then have their natural effect and create only a contingent interest⁸. The prior interest may be given to some person, either for the benefit of the donee himself, for example for his education and maintenance⁹, or for the benefit of the prior donee or other persons¹⁰.

1 *Phipps v Ackers* (1842) 9 Cl & Fin 583 at 591 per Tindal CJ. The happening of the event in such a case 'no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estate': *Phipps v Ackers* supra.

2 In *Boraston's Case* (1587) 3 Co Rep 16a, 19, the words chiefly considered were 'when' and 'then'. In *Phipps v Ackers* (1842) 9 Cl & Fin 583 at 591, Tindal CJ included 'if' as attracting the rule. See, however, *Doe d Wheedon v Lea* (1789) 3 Term Rep 41 at 43.

3 *Boraston's Case* (1587) 3 Co Rep 16a, 19 (where it seems to have been considered as a certainty that, if there was a devise to executors for payment of debts and performance of the will until a son should come of full age, the son would likewise have taken a vested, not a contingent, remainder); Tudor, LC Real Prop (4th Edn) 427; *Doe d Wheedon v Lea* (1789) 3 Term Rep 41. As to vested and contingent remainders see REAL PROPERTY vol 39(2) (Reissue) PARAS 169-171; and as to the effect of a gift over in the event of failure to attain the specified age see PARA 707 post.

4 The ordinary meaning of 'after the death of' occurring in a clause in a will disposing of capital of residue is not equivalent to 'subject to' prior interests, so as to carry surplus income before the death occurs: see *Re Wragg, Hollingsworth v Wragg* [1959] 2 All ER 717, [1959] 1 WLR 922, CA; and PARA 471 ante.

5 *Alexander v Alexander* (1855) 16 CB 59; *Re Williams, Spencer v Brighthouse* (1886) 54 LT 831; *Re Jobson, Jobson v Richardson* (1889) 44 ChD 154.

6 *Andrew v Andrew* (1875) 1 ChD 410, CA (where, as pointed out in *Re Jobson, Jobson v Richardson* (1889) 44 ChD 154 at 158 per North J, there was a gift over in default of the life tenant having a son); *Re James* (1884) 51 LT 596. Cf *Tatham v Vernon* (1861) 29 Beav 604 at 617. In *Simmonds v Cock* (1861) 29 Beav 455, the condition as to age was held to be, in the particular context, a condition subsequent.

7 See the text to notes 2-3 supra.

8 *Re Blackwell, Blackwell v Blackwell* [1926] Ch 223, CA (where an immediate gift for the eldest of the testator's sons, if any, 'who shall be living at the time of my death absolutely upon his attaining the age of 21 years', was held to be contingent on his attaining that age). In such a case no distinction can be drawn between 'when' and 'if': *Re Francis, Francis v Francis* [1905] 2 Ch 295 at 298.

9 *Goodtitle d Hayward v Whitby* (1757) 1 Burr 228; *Denn d Satterthwaite v Satterthwaite* (1764) 1 Wm Bl 519; *Stanley v Stanley* (1809) 16 Ves 491; *Goodright d Revell v Parker* (1813) 1 M & S 692 (renewable leaseholds); *Warter v Hutchinson* (1823) 1 B & C 721; *Warter v Hutchinson* (1820) 5 Moore CP 143; *Doe d Cadogan v Ewart* (1838) 7 Ad & El 636 at 663, 665; *Jackson v Marjoribanks* (1841) 12 Sim 93; *Bird v Bird* (1842) 6 Jur 1030; *Greene v Potter* (1843) 2 Y & C Ch Cas 517 at 522; *Milroy v Milroy* (1844) 14 Sim 48 (blended fund); *Re Mottram* (1864) 10 Jur NS 915.

10 *Boraston's Case* (1587) 3 Co Rep 16a, 19; *Taylor d Smith v Biddall* (1677) 2 Mod Rep 289; *Mansfield v Dugard* (1713) 1 Eq Cas Abr 195 pl 4; *Doe d Morris v Underdown* (1741) Willes 293; *Doe d Wheedon v Lea* (1789) 3 Term Rep 41; *Parkin v Knight* (1846) 15 Sim 83 at 86; *James v Lord Wynford* (1852) 1 Sm & G 40; *Re Radford, Jones v Radford* (1918) 62 Sol Jo 604. Cf *Hook v Taylor* (1706) 2 Vern 561 (maintenance until placed out as an apprentice).

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704. Gifts in default of issue.

The words 'in default of issue' or 'in default of such issue' introducing a gift after an estate tail are not words of contingency, but have been held to be appropriate words to use for introducing a remainder¹, and the gift may take effect even though issue have come into existence and failed².

1 *White v Summers* [1908] 2 Ch 256 at 271 per Parker J. See also *Leadbeater v Cross* (1876) 2 QBD 18. Similarly, the words 'in default of such issue' or 'for want of such issue' have been held to introduce a vested remainder and not a contingent limitation, where the prior gift was for life only: *Goodright d Lloyd v Jones* (1815) 4 M & S 88; *White v Summers* [1908] 2 Ch 256 at 272.

2 *Doe d Baroness Dacre v Dowager Lady Dacre* (1798) 1 Bos & P 250; *Lewis d Ormond v Waters* (1805) 6 East 336; *Ashley v Ashley* (1833) 6 Sim 358 at 363. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

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705. Application of the rule in *Boraston's Case* to personality.

The rule in *Boraston's Case*¹ is applicable to real estate and to equitable interests in it², but it applies also to personal estate which is directed to be converted into real estate³. Where land and personality are devised together, with a direction to invest the personality in the purchase of land, the rule applies to the personality⁴.

- 1 As to the rule in *Boraston's Case* (1587) 3 Co Rep 16a, 19 see PARA 703 ante.
- 2 *Phipps v Ackers* (1842) 9 Cl & Fin 583, HL.
- 3 See *Snow v Poulden* (1836) 1 Keen 186. Although this case was said in argument to be within the principle of *Boraston's Case* (1587) 3 Co Rep 16a, 19, there was no prior estate (see PARA 703 ante), and the vested estate, an estate tail, was subject to be divested if the donee did not attain 25. See also *Attwater v Attwater* (1853) 18 Beav 330.
- 4 *Jackson v Marjoribanks* (1841) 12 Sim 93 at 98.

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706. Gifts subject to prior interests.

With regard to both real and personal estate there is a rule, analogous to the rule in *Boraston's Case*¹, under which words apparently of condition do not prevent vesting. Thus words which, although in the form of a condition, merely denote that the gift is to come into possession on the failure or at the determination of prior interests do not as a general rule form a condition precedent to vesting². However, in order that a gift in such terms may be vested, the condition on which the gift is dependent must involve no incident but such as is essential to the failure or determination of the interests previously limited³, and must be equivalent to 'subject to the interests previously given'⁴. If any additional condition, not connected with the previous limitation, is imposed by the testator, that condition must be fulfilled prior to vesting⁵.

- 1 As to the rule in *Boraston's Case* (1587) 3 Co Rep 16a, 19 see PARA 703 ante.
- 2 See *Pearsall v Simpson* (1808) 15 Ves 29 (where there was a gift to A for life, then the capital for her children; if no child, for her husband for life; and after his death, in case he should become entitled, to other persons; there was no child, and, as the husband died in the lifetime of A, he never became entitled, yet the ultimate gift to other persons took effect); *Maddison v Chapman* (1858) 4 K & J 709 at 719 per Page Wood V-C (affd (1859) 3 De G & J 536); *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 41 per Lord Westbury; *Webb v Hearing* (1617) Cro Jac 415. See also *Massey v Hudson* (1817) 2 Mer 130 at 131; *Hillersdon v Lowe* (1843) 2 Hare 355 at 369, 371; *Key v Key* (1853) 4 De GM & G 73 at 79 ('in case annuitants or any of them shall survive K'); *Re Smith's Trusts* (1865) LR 1 Eq 79 ('in case of the death of E during the life of J'); *Chellew v Martin* (1873) 28 LT 662 at 664; *Leadbeater v Cross* (1876) 2 QBD 18 at 22; *Yule's Trustees v Deans* 1919 SC 570. Cf *Franks v Price* (1838) 5 Bing NC 37; *Re Blight, Blight v Hartnoll* (1880) 13 ChD 858; *Re Lowry's Will Trusts, Barclays Bank Ltd v United Newcastle-upon-Tyne Hospitals Board of Governors* [1967] Ch 638, [1966] 3 All ER 955. The principle may be applied not only where the contingency is a condition subsequent for the determination of the previous gift, but where it is a condition precedent to that gift: *Re Sanforth's Will* [1901] WN 152. A gift in default of appointment under a power is not of itself contingent until the exercise of that power; it is vested subject to being divested by appointments under the power: see POWERS vol 36(2) (Reissue) PARA 283.
- 3 *Maddison v Chapman* (1858) 4 K & J 709 at 719 per Wood V-C; *M'Kay v M'Kay* [1901] 1 IR 109 at 120.
- 4 *Maddison v Chapman* (1858) 4 K & J 709 at 719 per Wood V-C (affd (1859) 3 De G & J 536); *Re Martin, Smith v Martin* (1885) 53 LT 34 at 35 per Kay J; *Re Shuckburgh's Settlement, Robertson v Shuckburgh* [1901] 2 Ch 794 at 798; *Re Burden, Mitchell v St Luke's Hostel Trustees* [1948] Ch 160, [1948] 1 All ER 31. Cf *Birds v Askey* (1857) 24 Beav 615. However, in order to interpret 'after the death of my wife' as equivalent to 'subject to my wife's interests', some special context is needed: see *Re Browne's Will Trusts, Landon v Brown* [1915] 1 Ch 690; *Re Wragg, Hollingsworth v Wragg* [1959] 2 All ER 717, [1959] 1 WLR 922, CA; and PARAS 471, 703 note 4 ante. For instances where the natural construction was given to such words see *Weatherall v Thornburgh* (1878) 8 ChD 261, CA; *Berry v Green* [1938] AC 575 at 582, sub nom *Re Blake, Berry v Geen* [1938] 2 All ER 362 at 365, HL; *Re Gillett's Will Trusts* [1950] Ch 102, [1949] 2 All ER 893; *Re Robb's Will Trusts, Marshall v Marshall* [1953] Ch 459, [1953] 1 All ER 920; *Re Nash, Miller v Allen* [1965] 1 All ER 51, [1965] 1 WLR 221. As to

the construction of 'after the death of' an annuitant see *Re Geering, Gulliver v Geering* [1964] Ch 136, [1962] 3 All ER 1043.

5 *Maddison v Chapman* (1858) 4 K & J 709 at 720; *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 40 per Lord Hatherley LC; *Merchants Bank of Canada v Keefer* (1885) 13 SCR 515 (where it was held that the words 'if then living' added a contingency because they were otherwise redundant).

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D. EFFECT OF GIFT OVER ON VESTING OF PRIOR GIFT

707. Contingent gift over.

Where real estate is devised to a devisee 'if' or 'when' he attains a specified age and there is a gift over¹ in the event of his failing to attain that age, with or without other contingencies, the attainment of the age is held to be a condition subsequent and not precedent, and the estate is vested immediately subject to its being divested if the devisee dies under that age². For this rule to apply, there must be an express gift over which sets out the conditions on which the gift over will take place and which includes among those conditions the counterparts, although not necessarily the identical counterparts, of the conditions applicable to the prior gift³. The rule is based on the principle that in the event of the devisee dying under that age the subsequent gift over sufficiently shows the testator's meaning to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which gives him the immediate interest subject only to the chance of its being divested on a future contingency⁴. The rule does not apply where there is an express direction as to vesting⁵, and it is not required where vesting is implied from a trust for maintenance out of the intermediate income⁶. There is no difference in this respect between devises to individuals and devises to classes where, for example, there is a gift to children as they respectively attain a specified age but, if they all die under that age, a gift over⁷; and the rule applies to personal as well as to real estate⁸. The rule has been applied where the original gift was apparently contingent on surviving a life tenant but there was a gift over if the donee should die in the lifetime of the life tenant without leaving issue⁹. However, a gift over on the death of the donee before the life tenant, simply and without any further contingency, does not raise the same inference as to vesting¹⁰.

1 As to gifts over by necessary implication see PARA 752 post.

2 *Phipps v Ackers* (1842) 9 Cl & Fin 583 at 591-592, HL (cited in PARA 703 ante); *McGredy v IRC* [1951] NI 155; *Re Penton's Settlements, Humphrey v Birch-Reynardson* [1968] 1 All ER 36, [1968] 1 WLR 248; *Re Kilpatrick's Policies Trusts, Kilpatrick v IRC* [1966] Ch 730, [1966] 2 All ER 149, CA; *Brotherton v IRC* [1978] 2 All ER 267, [1978] 1 WLR 610, CA. See also PARAS 721-722, 733 post.

3 *Re Mallinson Consolidated Trusts, Mallinson v Gooley* [1974] 2 All ER 530, [1974] 1 WLR 1120. See also *Re Penton's Settlements, Humphreys v Birch-Reynardson* [1968] 1 All ER 36 at 43, [1968] 1 WLR 248 at 256 per Ungood-Thomas J.

4 *Phipps v Ackers* (1842) 9 Cl & Fin 583 at 592, HL; *Bull v Pritchard* (1847) 5 Hare 567 at 571 per Wigram V-C (adopted in *Boulton v Beard* (1853) 3 De GM & G 608 at 613 per Turner LJ). This rule dates from and is sometimes called the rule in *Edwards v Hammond* (1684) 3 Lev 132, and instances of its application before *Phipps v Ackers* supra are *Bromfield v Crowder* (1805) 1 Bos & PNR 313 (affd (1811) cited in 14 East at 604, HL); *Doe d Hunt v Moore* (1811) 14 East 601. The judges were consulted in *Phipps v Ackers* supra in order to review these last two cases; *Doe d Hunt v Moore* supra had been doubted by Lord Brougham at an earlier stage (*Phipps v Ackers* (1835) 3 Cl & Fin 702, HL). Lord St Leonards referred with approval to *Bromfield v Crowder*

supra, *Doe d Hunt v Moore* supra and *Phipps v Ackers* supra in *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 224-226. See also *Hepworth v Scale* (1855) 1 Jur NS 698; *Re Dennis* (1903) 5 OLR 46.

5 *Russel v Buchanan* (1836) 7 Sim 628.

6 *Re Astor, Astor v Astor* [1922] 1 Ch 364 at 368, CA, per Russell J.

7 *Doe d Roake v Nowell* (1813) 1 M & S 327 (affd sub nom *Randoll v Doe d Roake* (1817) 5 Dow 202, HL); *Farmer v Francis* (1824) 2 Bing 151 (subsequent proceedings (1826) 2 Sim & St 505); *Doe d Dolley v Ward* (1839) 9 Ad & El 582. Cf *Blagrove v Hancock* (1848) 16 Sim 371 (which seems not to be in accordance with other decisions).

8 The rule appears to have been established with a view to preventing gifts in remainder being liable to destruction as contingent remainders owing to there being no legal estate to support them before they fell into possession, and, for this purpose, the language of the will was strained: *Pearks v Moseley* (1880) 5 App Cas 714 at 721, HL, per Lord Selborne LC; *Re Astor, Astor v Astor* [1922] 1 Ch 364 at 385, CA, per Warrington LJ. On this view the rule should have been confined to legal remainders but it applied to equitable remainders (*Phipps v Ackers* (1842) 9 Cl & Fin 583 at 594, 599, HL), to executory trusts (*Phipps v Ackers* supra at 600; *Stanley v Stanley* (1809) 16 Ves 491), to gifts of residuary real and personal estate (*Whitter v Bembridge* (1866) LR 2 Eq 736), and to personalty alone (*Re Heath, Public Trustee v Heath* [1936] Ch 259, which at 265 also makes it plain that the rule does not apply where there is no gift over). See also *McGredy and McGredy's Trustees v IRC* [1951] NI 155; *Re Kilpatrick's Policies Trusts, Kilpatrick v IRC* [1966] Ch 730, [1966] 2 All ER 149, CA.

9 *Finch v Lane* (1870) LR 10 Eq 501.

10 *Doe d Planner v Scudamore* (1800) 2 Bos & P 289. As to the effects of gifts at a specified age followed by a gift over on death under the specified age without issue see the text and note 7 supra. See also PARA 708 post.

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708. Contingency part of description of donee.

The rule as to contingent gifts over¹ does not apply where the contingency is part of the description of the donee, as, for example, where the devise is to such children as attain or shall attain the specified age². The difference is to be noted³ between a gift in this form, which is contingent, and a gift to certain persons at the specified age, which is vested, there being in each case a gift over⁴. The rule does not apply where the gift over is contingent on an event which either cannot happen until after the death of the first taker⁵ or has no relation to the first taker's interest⁶.

1 As to this rule see PARA 707 text and notes 1-4 ante.

2 *Duffield v Duffield* (1829) 3 Bli NS 260 at 333, HL; *Festing v Allen* (1843) 12 M & W 279; *Re Astor, Astor v Astor* [1922] 1 Ch 364, CA. See also *Bull v Pritchard* (1847) 5 Hare 567 at 571-572; *Holmes v Prescott* (1864) 10 Jur NS 507; *Rhodes v Whitehead* (1865) 2 Drew & Sm 532 at 536; *Price v Hall* (1868) LR 5 Eq 399 at 402; *Re Murphy, Murphy v Murphy and Byrne* [1964] IR 308 (gift over conditional). The decisions in *Riley v Garnett* (1849) 3 De G & Sm 629 and *Browne v Browne* (1857) 26 LJ Ch 635 (see *Best v Donmall* (1871) 40 LJ Ch 160 at 162-163) were overruled: see *Holmes v Prescott* supra; *Re Williams, Spencer v Brighthouse* (1886) 54 LT 831. A devise to donees where the contingency of attaining a specified age was part of the description has been held to be contingent on attaining the age in limitations construed as operating as contingent remainders (see *Brackenbury v Gibbons* (1876) 2 ChD 417; *Symes v Symes* [1896] 1 Ch 272; *White v Summers* [1908] 2 Ch 256), and in gifts operating as executory limitations (see *Abbiss v Burney, Re Finch* (1880) 17 ChD 211, CA (equitable estate); *Re Lechmere and Lloyd* (1881) 18 ChD 524; *Miles v Jarvis* (1883) 24 ChD 633; *Dean v Dean* [1891] 3 Ch 150; *Re Bourne, Rymer v Harpley* (1887) 56 LT 388); but the distinction between contingent remainders and executory limitations has lost its importance (see PARA 702 ante). See also *Andrew v Andrew* (1875) 1 ChD 410, CA (cited in PARA 703 note 6 ante); *Muskett v Eaton* (1875) 1 ChD 435 (where a reference to children born in due time after the death of the life tenant showed that attainment of a specified age was not part of the description); *Abbiss v Burney, Re Finch* supra; *Perceval v Perceval* (1870) LR 9 Eq 386; *Re Eddels' Trusts* (1871) LR 11 Eq 559; *Pearks v Moseley* (1880) 5 App Cas 714 at 730, HL; *Ferguson v Ferguson* (1886) 17

LR Ir 552 at 559-560. Cf *Berry v Berry* (1878) 7 ChD 657; *Re Brooke, Brooke v Brooke* [1894] 1 Ch 43. See also the cases as to personal estate, eg *Bull v Pritchard* (1826) 1 Russ 213; *Webster v Boddington* (1858) 26 Beav 128.

3 *Doe d Dolley v Ward* (1839) 9 Ad & El 582 at 605-606; *Holmes v Prescott* (1864) 10 Jur NS 507 at 513 per Wood V-C; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693 at 699 per Parker J. See, however, *Re Mid Kent Railway Act 1856, ex p Styan* (1859) John 387 at 396.

4 See *Farmer v Francis* (1824) 2 Bing 151; *Farmer v Francis* (1826) 2 Sim & St 505; *Doe d Dolley v Ward* (1839) 9 Ad & El 582 at 605-606; *Attwater v Attwater* (1853) 18 Beav 330; and PARA 707 ante.

5 *L'Estrange v L'Estrange* (1890) 25 LR Ir 399 at 417, Ir CA.

6 *Price v Hall* (1868) LR 5 Eq 399 at 403.

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E. GIFTS OUT OF PERSONAL ESTATE

(A) IN GENERAL

709. Property to which the rules apply.

The following rules apply to specific legacies of personal estate, including leaseholds¹ and the proceeds of real estate held on trust for sale², and to general legacies so far as they are charged on personal estate or the proceeds of sale of real estate held on trust for sale; but in the case of trusts for sale, where the testator dies on or after 1 January 1997, the rules only apply where the trust for sale was created by the will of another testator who died before that date³. If freeholds are given together with leaseholds or other personal estate under a single description in terms such that a vested estate in the freeholds is given⁴, the interests in the leaseholds or other personal estate may also be considered as vested even though, according to the rules, they would be regarded as contingent⁵.

1 *Re Hudson's Minors* (1843) Drury temp Sug 6; *Ingram v Suckling* (1859) 7 WR 386.

2 *Re Hart's Trusts, ex p Block* (1858) 3 De G & J 195; *Bellairs v Bellairs* (1874) LR 18 Eq 510 at 514.

3 In relation to all other trusts for sale, the doctrine of conversion whereby land held by trustees subject to a trust for sale is to be regarded as personal property has been abolished: see the Trusts of Land and Appointment of Trustees Act 1996 ss 3, 25(5); and REAL PROPERTY vol 39(2) (Reissue) PARAS 77, 207. The doctrine of conversion is not wholly abolished by s 3 and will still apply to eg uncompleted agreements for the sale of land. As to the doctrine of conversion see further EQUITY vol 16(2) (Reissue) PARA 701 et seq.

4 Ie under the rules described in PARA 696 et seq ante.

5 *Farmer v Francis* (1826) 2 Sim & St 505 (residue); *Tapscott v Newcombe* (1842) 6 Jur 755; *James v Lord Wynford* (1852) 1 Sm & G 40 at 59-60. The rules of law as to contingent remainders in real estate did not prevent effect being given to the intention as to the personal estate: *Holmes v Prescott* (1864) 10 Jur NS 507; *White v Summers* [1908] 2 Ch 256 at 264. See also PARA 702 note 1 ante.

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710. Distinction between vesting and payment.

In all cases of legacies given on any future event, whether certain to happen or not, where the gift is wholly dependent on that event¹ so that it must have happened before any part of the testator's bounty can attach to the legatee, the time of vesting is the occurrence of that event, but, where the gift is not so dependent, the time of payment only is postponed to that event². Where the gift is not wholly dependent on the event, the legatee may take a vested interest at once subject to such postponed payment³.

1 In such cases 'the time is annexed to the substance of the gift': *Monkhouse v Holme* (1783) 1 Bro CC 298 at 300.

2 *May v Wood* (1792) 3 Bro CC 471 at 473; *Leeming v Sherratt* (1842) 2 Hare 14 at 19.

3 The court adopts the view of the civil law that such a legacy is owed at the present time but payable in the future: *Maddison v Andrew* (1747) 1 Ves Sen 57 at 59; *Monkhouse v Holme* (1783) 1 Bro CC 298 at 300; *Crickett v Dolby* (1795) 3 Ves 10 at 13; *Re Crother's Trusts (No 2)* [1917] 1 IR 356. Accordingly, if the legatee has a vested interest but he dies before the date of payment, his representatives are entitled: *Bateman v Roach* (1724) 9 Mod Rep 104. See also PARA 699 ante.

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(B) DIRECTION AS TO PAYMENT

711. Gift contained wholly in direction to pay.

Where a gift is a simple gift on a future event, or from and after a future event or is contained wholly in a direction to pay, or to divide or to transfer, at or from and after a future event, so that there is no gift except in the direction to pay or transfer, prima facie the vesting is postponed until that event happens; and, consequently, if the legatee dies before that event, prima facie his representatives are not entitled to payment¹. Thus a legacy to a named person at a certain definite future time, without more, prima facie is contingent and he or his representatives take no interest if he dies before that time². A gift to a class on a contingency prima facie does not, however, render the contingency applicable to the description of the class³.

1 *Stapleton v Cheales* (1711) Prec Ch 317 (the second rule in this case); *Leake v Robinson* (1817) 2 Mer 363 at 387 per Grant MR; *Webber v Webber* (1823) 1 Sim & St 311 (marriage); *Murray v Tancred* (1840) 10 Sim 465; *Leeming v Sherratt* (1842) 2 Hare 14 at 18; *Bruce v Charlton* (1842) 13 Sim 65; *Chevaux v Aislabie* (1842) 13 Sim 71; *Lang v Pugh* (1842) 1 Y & C Ch Cas 718; *Beck v Burn* (1844) 7 Beav 492 (which, however, should have been decided otherwise because of the intervening life estate: see *Adams v Robarts* (1858) 25 Beav 658 at 661); *Morgan v Morgan* (1851) 4 De G & Sm 164 (marriage); *Chance v Chance* (1853) 16 Beav 572; *Gardiner v Slater* (1858) 25 Beav 509; *Re Wrangham's Trust* (1860) 1 Drew & Sm 358; *Locke v Lamb* (1867) LR 4 Eq 372; *Johnston v O'Neill* (1879) 3 LR Ir 476 at 482.

2 *Smell v Dee* (1707) 2 Salk 415 (criticised on other grounds in *King v Withers* (1735) Cas temp Talb 117 at 124); *Bruce v Charlton* (1842) 13 Sim 65 at 68; *Re Eve, Belton v Thompson* (1905) 93 LT 235. For cases where there was a distinction between the gift and the direction to pay see PARA 712 note 4 post. As to a direction for payment within a certain time see *Edmunds v Waugh* (1858) 4 Drew 275; on appeal (1863) 2 New Rep 408.

3 As to a gift to a class on contingency see PARA 594 ante.

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712. Express distinction between gift and time of payment.

If the words of a gift express a distinction between the gift itself and the event denoting the time of payment, division or transfer¹, and this time is the attainment by the donee of the age of 21 years² or other age³ or is any other event which, assuming the requisite duration of life, must necessarily happen at a determinable time⁴, then prima facie⁵ the gift is not contingent in respect of that event⁶. The donee's personal representative is accordingly entitled to the gift, even if the donee dies before attaining the specified age or before the named event, but prima facie he is not entitled to payment before the donee himself would have been so entitled⁷. This presumption as to vesting does not arise where the gift is on an event, such as the donee's marriage, which will not necessarily happen at all, however long the donee or other person concerned lives⁸. However, in such a case, other indications may be present to show that the vesting is independent of the named event⁹.

Even where the gift and direction to pay are distinct, the context may show that the gift is contingent¹⁰. A mere direction for accumulation until payment, however, is not sufficient¹¹, and even an express contingency attached to payment may not be sufficient to make the vesting contingent¹².

1 As to what is sufficient distinction between the gift and the direction to pay see *Re Bartholomew's Trust* (1849) 1 Mac & G 354 (commented on in *Locke v Lamb* (1867) LR 4 Eq 372 at 380); *Williams v Clark* (1851) 4 De G & Sm 472 (where a distinction was considered to exist); *Shum v Hobbs* (1855) 3 Drew 93; *Merry v Hill* (1869) LR 8 Eq 619 (where no distinction existed). See also *Cooney v Nicholls* (1881) 7 LR Ir 107, Ir CA.

2 *Chambers v Jeoffrey* (1709) 2 Eq Cas Abr 541 pl 9; *Skey v Barnes* (1816) 3 Mer 335; *Vivian v Mills* (1839) 1 Beav 315; *Lister v Bradley* (1841) 1 Hare 10 at 12 ('to my four children, to be paid them when or if they attain 21'); *Williams v Clark* (1851) 4 De G & Sm 472; *Shrimpton v Shrimpton* (1862) 31 Beav 425.

3 *Farmer v Francis* (1826) 2 Sim & St 505; *Blease v Burgh* (1840) 2 Beav 221; *Saumarez v Saumarez* (1865) 34 Beav 432. Such postponement of enjoyment after his majority may be ineffectual against the donee: see PARA 437 ante.

4 *Sidney v Vaughan* (1721) 2 Bro Parl Cas 254 (six months after serving apprenticeship); *Chaffers v Abell* (1839) 3 Jur 577 (when youngest 21). As to a gift with a direction to pay at a certain fixed time after the testator's death see *Sheldon v Sheldon* (1739) 9 Mod Rep 211; *Jackson v Jackson* (1749) 1 Ves Sen 217; *Lucas v Carline* (1840) 2 Beav 367; *Leeming v Sherratt* (1842) 2 Hare 14 at 19-20; *Bromley v Wright* (1849) 7 Hare 334 at 344; *Oppenheim v Henry* (1853) 10 Hare 441.

5 For instances where the context displaced the presumption see *Oseland v Oseland* (1795) 3 Anst 628; *Knight v Cameron* (1807) 14 Ves 389 (where the gift was also contingent on the donee being then living).

6 This is the first rule in *Stapleton v Cheales* (1711) Prec Ch 317: Tudor, LC Real Prop (4th Edn) 438, 459. See *Jackson v Jackson* (1749) 1 Ves Sen 217 (gifts to R, 'to be paid' at various times); *Wadley v North* (1797) 3 Ves 364 (gift to children of A, 'each receiving' his share at 21); *Bolger v Mackell* (1800) 5 Ves 509 ('to be paid' at 21 or marriage); *Clutterbuck v Edwards* (1832) 2 Russ & M 577. The rule arose in the ecclesiastical courts and was adopted by courts of law and of equity as to personal legacies but not as to real estate or legacies charged on real estate: see *Maddison v Andrew* (1747) 1 Ves Sen 57 at 59; *Mackell v Winter* (1797) 3 Ves 536 at 543 per Lord Loughborough LC; and PARA 724 post.

7 *Chester v Painter* (1725) 2 P Wms 335 at 337; *Roden v Smith* (1744) Amb 588; *Maher v Maher* (1877) 1 LR Ir 22. A direction for payment of the whole interest of the legacy to the donee in the meantime will, however, entitle the personal representative to immediate payment on the death of the donee, even before the donee himself would have been entitled to payment: *Cloberry v Lampen* (1677) Freem Ch 24; *Anon* (1690) 2 Vern 199; *Fonnereau v Fonnereau* (1748) 1 Ves Sen 119; *May v Wood* (1792) 3 Bro CC 473 at 474; *Hanson v Graham*

(1801) 6 Ves 239. As to such gifts see PARA 713 post. A mere direction to allow maintenance not amounting to a gift of the interest does not render the legacy payable before the legatee would be entitled: *Harrison v Buckle* (1719) 1 Stra 238.

8 *Atkins v Hiccocks* (1737) 1 Atk 500; *Ellis v Ellis* (1802) 1 Sch & Lef 1; *Morgan v Morgan* (1851) 4 De G & Sm 164 at 167; *Re Cantillon's Minors* (1864) 16 I Ch R 301 at 308. In *Maher v Maher* (1877) 1 LR Ir 22, the testator bequeathed £1,500 to each of his younger children surviving him, which was to be paid as they should respectively attain 21 or marry with consent; and it was held that the legacies were vested but that the personal representative of a child dying a spinster under 21 was not entitled to payment until the time at which that child would have attained that age.

9 See eg *Booth v Booth* (1799) 4 Ves 399 (whole interest given in the meantime); *Vize v Stoney* (1841) 1 Dr & War 337 at 349-350 (legacy carrying interest); *Corr v Corr* (1873) IR 7 Eq 397; *M'Cutcheon v Allen* (1880) 5 LR Ir 268; *Re Wrey, Stuart v Wrey* (1885) 30 ChD 507 (legacy carrying interest); and PARA 714 et seq post.

10 *Knight v Cameron* (1807) 14 Ves 389; *Judd v Judd* (1830) 3 Sim 525 (reconsidered in *Hunter v Judd* (1833) 4 Sim 455); *Chevaux v Aislabie* (1842) 13 Sim 71; *Merry v Hill* (1869) LR 8 Eq 619. See also *Heath v Perry* (1744) 3 Atk 101.

11 *Stretch v Watkins* (1816) 1 Madd 253; *Bull v Johns* (1830) Taml 513; *Josselyn v Josselyn* (1837) 9 Sim 63; *Blease v Burgh* (1840) 2 Beav 221 at 226; *Saunders v Vautier* (1841) Cr & Ph 240; *Oppenheim v Henry* (1853) 10 Hare 441; *Re Bragger, Bragger v Bragger* (1887) 56 LT 521; *Re Thompson, Griffith v Thompson* (1896) 44 WR 582; *Re Couturier, Couturier v Shea* [1907] 1 Ch 470. A donee having a vested interest, subject to postponement by such accumulation, may put an end to such accumulation and claim payment on attaining majority: *Re Couturier, Couturier v Shea* supra at 473.

12 *Massey v Hudson* (1817) 2 Mer 130 ('12 months from death of B in case B shall happen to survive my wife'); *Clutterbuck v Edwards* (1832) 2 Russ & M 577 ('on decease of wife if he shall then have attained 21'); *Wright v Wright* (1852) 21 LJ Ch 775 (if donees were of competent understanding).

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713. Implied distinction between gift and time of payment.

The context may show that a gift is vested, even where there is no express distinction between the gift and a direction as to the time of payment. Thus it may appear that the reason for the postponement of the gift is on account of prior interests given in the meantime, or on account of the nature of the property and the convenience of administration¹. In such a case, the gift prima facie vests independently of the postponement of enjoyment².

Accordingly, prima facie no contingency is imported by the fact that the legacy is given after a life interest in the property bequeathed³. Where a legacy is given to a donee contingently on attaining a specified age, the fact that the legacy is also postponed to a life interest prima facie does not render it contingent on the donee's surviving the life tenant⁴, and the fact that the interest is given to another person pending his attaining that age may be an indication of a vested gift⁵.

A gift to a class of children when the youngest attains a specified age confers a vested interest on all who attain that age, whether they are living or dead at the time of payment⁶. There is, however, no general principle of construction applicable to gifts when the youngest attains a specified age that the child must attain that age in order to take a vested interest⁷. The question must always turn on the actual words of the will under consideration⁸. A contrary inference may be drawn from other provisions in the will⁹. In the case of a similar gift to individuals, and not to a class, prima facie they take vested interests, even though they die before the specified age¹⁰.

1 See the rule, which is applicable generally to the vesting of any gift, stated at para 666 ante.

2 *Packham v Gregory* (1845) 4 Hare 396 at 398; *Bromley v Wright* (1849) 7 Hare 334 at 342; *Re Bennett's Trust* (1857) 3 K & J 280 at 283; *Adams v Robarts* (1858) 25 Beav 658 at 661; *Re Couturier, Couturier v Shea* [1907] 1 Ch 470 at 472; *Browne v Moody* [1936] AC 635, [1936] 2 All ER 1695, PC; *Greenwood v Greenwood* [1939] 2 All ER 150, PC; *Re Brooke's Will Trusts, Jubber v Brooke* [1953] 1 All ER 668, [1953] 1 WLR 439.

3 *Corbett v Palmer* (1735) 2 Eq Cas Abr 548 pl 24; *Medlicot v Bowes* (1749) 1 Ves Sen 207; *Hatch v Mills* (1759) 1 Eden 342; *Barnes v Allen* (1782) 1 Bro CC 181; *Monkhouse v Holme* (1783) 1 Bro CC 298; *A-G v Crispin* (1784) 1 Bro CC 386; *Benyon v Maddison* (1786) 2 Bro CC 75; *Roebuck v Dean* (1793) 4 Bro CC 403; *Molesworth v Molesworth* (1793) 4 Bro CC 408; *Bayley v Bishop* (1803) 9 Ves 6; *Hallifax v Wilson* (1809) 16 Ves 168; *Blamire v Geldart* (1809) 16 Ves 314; *Burton v Hodsoll* (1827) 2 Sim 24; *Cousins v Schroder* (1830) 4 Sim 23; *Cochrane v Wiltshire* (1847) 16 LJ Ch 366; *Re Bright's Trusts* (1855) 21 Beav 67; *Re Bennett's Trusts* (1857) 3 K & J 280; *Strother v Dutton* (1857) 1 De G & J 675; *Adams v Robarts* (1858) 25 Beav 658; *Hickling v Fair* [1899] AC 15, HL; *Re Crother's Trusts (No 2)* [1917] 1 IR 356; *Browne v Moody* [1936] AC 635, [1936] 2 All ER 1695, PC. For an example of a context to the contrary see *Willis v Plaskett* (1841) 4 Beav 208.

4 *Hallifax v Wilson* (1809) 16 Ves 168; *Walker v Main* (1819) 1 Jac & W 1; *Cousins v Schroder* (1830) 4 Sim 23; *Jones v Jones* (1843) 13 Sim 561; *Mendham v Williams* (1866) LR 2 Eq 396; *Re Cohn, National Westminster Bank Ltd v Cohn* [1974] 3 All ER 928, [1974] 1 WLR 1378, CA. For an example of a context to the contrary see *Billingsley v Wills* (1745) 3 Atk 219.

5 *Lane v Goudge* (1803) 9 Ves 225; *Re Cohn, National Westminster Bank Ltd v Cohn* [1974] 3 All ER 928, [1974] 1 WLR 1378, CA.

6 *Leeming v Sherratt* (1842) 2 Hare 14; *Re Smith's Will* (1855) 20 Beav 197; *Brocklebank v Johnson* (1855) 20 Beav 205; *Kennedy v Sedgwick* (1857) 3 K & J 540. For cases where the children were expressly required to survive distribution see *Castle v Eate* (1844) 7 Beav 296; *Re Hunter's Trusts* (1865) LR 1 Eq 295. For special cases as to the time of payment see *Beckton v Barton* (1859) 5 Jur NS 349; *Evans v Pilkington* (1839) 10 Sim 412. See also *Re Nicholson, Stace v Nicholson* (1904) 24 NZLR 633; *Re Osmond, Cummings v Galaway* (1910) 30 NZLR 65.

7 *Re Lodwig, Lodwig v Evans* [1916] 2 Ch 26, CA (disapproving the dictum in *Leeming v Sherratt* (1842) 2 Hare 14 at 23, that, where a testator postpones the division of residue until his youngest child attains a particular age, no child who does not attain that age can be intended to take; and disapproving *Lloyd v Lloyd* (1856) 3 K & J 20 and *Parker v Sowerby* (1853) 1 Drew 488, so far as the decisions in those cases were based on the dictum in *Leeming v Sherratt* supra). See also *Cooper v Cooper* (1861) 29 Beav 229 (where the gift was not to a class but to individuals).

8 *Re Lodwig, Lodwig v Evans* [1916] 2 Ch 26 at 36, CA (where the interests of the children have been held not to be contingent on attaining the age). For other cases where the interests of the children have been held not to be contingent on attaining the age see *Re Grove's Trusts* (1862) 3 Giff 575; *Boulton v Pilcher* (1861) 29 Beav 633 (where the court relied on a trust for maintenance which appears to have been treated as a trust to maintain each beneficiary with the income of his expectant share; cf para 715 post); *Knox v Wells* (1864) 2 Hem & M 674 (where there was a distinction between the gift and the direction as to time of payment; cf para 712 ante). For cases where the interests of the children have been held to be contingent see *Lloyd v Lloyd* (1856) 3 K & J 20; *Coldicott v Best* [1881] WN 150; cf *Ford v Rawlins* (1823) 1 Sim & St 328 (where there was a discretionary power to distribute among children when the youngest attained 21).

9 See the cases cited in note 8 supra.

10 *Cooper v Cooper* (1861) 29 Beav 229; *Re Radford, Jones v Radford* (1918) 62 Sol Jo 604.

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(C) DIRECTION AS TO MAINTENANCE

714. Gift of interim interest.

Unless the context is to the contrary¹, where a postponed gift is accompanied by a gift of the whole interim interest of the fund to the donee², it is presumed that the testator meant a single immediate vested gift³. In order to raise this presumption, the gift of interim income must be free from contingency⁴, but it may be dependent on the non-occurrence of the event on which the gift of capital is to take effect⁵. Accordingly, the presumption does not arise where the capital and income of the legacy are given in a single gift⁶ so that the same contingency applies to them both. Where the presumption applies, it applies whatever the nature of the contingent event denoting the time of payment of the capital of the legacy⁷.

The fact that the income and capital of the subject matter are given subject to annuities or life interests is immaterial; however the capital given may be charged, if the income of that capital less the charges is given, then the rule is satisfied⁸. It has been held insufficient, however, that the income of property equal in amount to the property which is to be the subject of the gift should be directed to be paid to the legatee, if the severance of the particular property given from the rest of the testator's property is only to take place at the future time of payment⁹; or that an annuity equal to the interest on the sum given should be given to the donee pending the event, but not as interest on the capital¹⁰.

1 For cases where in the context the gift of capital was nevertheless held contingent see *Vawdrey v Geddes* (1830) 1 Russ & M 203 at 208 (where there was a gift over (see PARA 721 post) in the case of death before a particular time, although the case has been criticised in this respect); *Mills v Roberts* (1830) Taml 476; *Re Bulley's Trust Estate* (1865) 11 Jur NS 847.

2 A postponed legacy may in certain cases carry interest from the testator's death, but this may be independent of the question whether the legacy is vested or not: see eg *Wynch v Wynch* (1788) 1 Cox Eq Cas 433; *Re Rouse's Estate* (1852) 9 Hare 649. As to the question of interest on legacies see *Re Palfreeman, Public Trustee v Palfreeman* [1914] 1 Ch 877 (criticising *Pickwick v Gibbes* (1839) 1 Beav 271 and *Coventry v Higgins* (1844) 14 Sim 30; and holding that legacies payable to a legatee on attaining a specific age carried interest on the expiration of one year from the testator's death if the legatee had attained the age in the testator's lifetime). See generally EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 499 et seq.

3 *Cloberry v Lampen* (1677) 2 Eq Cas Abr 539; *Green v Pigot* (1781) 1 Bro CC 103; *Keily v Monck* (1795) 3 Ridg Parl Rep 205 at 256; *Hanson v Graham* (1801) 6 Ves 239; *Gardiner v But* (1818) 3 Madd 425; *Rose v Sowerby* (1830) Taml 376; *Vawdry v Geddes* (1830) 1 Russ & M 203 at 208 per Leach MR; *Saunders v Vautier* (1841) Cr & Ph 240 at 248; *Re Jacob's Will* (1861) 29 Beav 402; *Dundas v Wolfe Murray* (1863) 1 Hem & M 425; *Re Bunn, Isaacson v Webster* (1880) 16 ChD 47 at 48; *Re Wrey, Stuart v Wrey* (1885) 30 ChD 507 at 510, 512; *Scotney v Lomer* (1886) 31 ChD 380, CA; *Brennan v Brennan* [1894] 1 IR 69 at 73 per Chatterton V-C. In so far as *Batsford v Kebbell* (1797) 3 Ves 363, and *Spencer v Wilson* (1873) LR 16 Eq 501 at 514, depend on treating the gifts of capital and of income of the property as separate gifts, they are not followed: see eg *Re Holt's Estate, Bolding v Strugnell* (1876) 45 LJ Ch 208 at 209; and note 9 infra. An intention to make such separate gifts may, however, be shown: see *Re Peek's Trusts* (1873) LR 16 Eq 221.

4 See *Hubert v Parsons* (1751) 2 Ves Sen 261 at 263; *Re Thruston's Will Trusts* (1849) 17 Sim 21.

5 *Hammond v Maule* (1844) 1 Coll 281.

6 *Knight v Knight* (1826) 2 Sim & St 490. See also *Morgan v Morgan* (1851) 4 De G & Sm 164 at 167; *Re Kirkley, Halligey v Kirkley* (1918) 87 LJ Ch 247. For a contrary decision see *Collins v Metcalfe* (1687) 1 Vern 462. Cf *Locke v Lamb* (1867) LR 4 Eq 372 (where the interest was directed to be accumulated); *Breedon v Tugman* (1834) 3 My & K 289 (where the construction making the same contingency apply to both was avoided).

7 *Booth v Booth* (1799) 4 Ves 399; *Vize v Stoney* (1841) 1 Dr & War 337 at 350; *Re Wrey, Stuart v Wrey* (1885) 30 ChD 507 (marriage).

8 *Potts v Atherton* (1859) 28 LJ Ch 486 (life annuity); *Jones v Mackilwain* (1862) 1 Russ 220. See also *Lane v Goudge* (1803) 9 Ves 225.

9 *Batsford v Kebbell* (1797) 3 Ves 363 (where the testatrix gave to A the dividends of a £500 stock until he should attain the age of 32, at which time she directed her executors to transfer the principal to him; and it was held that the legacy did not vest until A was 32). See also *Re Hart's Trusts, ex p Block* (1858) 3 De G & J 195 at 202; *Re Wrey, Stuart v Wrey* (1885) 30 ChD 507 (where the testatrix by her will, after specific bequests of bonds, gave all the rest of her stocks and shares on trust to pay the income to G until his marriage, and at the time of his marriage to hand over the stocks and shares to him; and it was held that G took a vested interest

under the gift and, being of age, was entitled to have the stocks and shares comprised in the gift transferred to him, even though he had not married). In *Re Wrey, Stuart v Wrey* supra at 510, Kay J said that *Batsford v Kebbell* supra, where the essential point was that the gifts of dividends and capital were distinct, would not be followed except in a case on all fours with it.

10 *Watson v Hayes* (1839) 5 My & Cr 125 at 134; *Merlin v Blgrave* (1858) 25 Beav 125.

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715. Gift of interim maintenance.

Where provision is made for the maintenance of a legatee in the meantime, the question arises whether it is a distinct gift from the legacy in question or is merely a direction as to the mode of application of the interest on the legacy¹. If the maintenance is given as a distinct gift, it has no effect in making the legacy vested².

Where the donee is an individual or one of a group of persons taking as individuals and not as a class, the fact that the gift is to carry interest, and that the whole interest or income of the gift is directed to be applied for the donee's maintenance, or in some other manner for his benefit, until the contingent event on which the legacy itself is given, is an indication³ that vesting is independent of the contingency⁴. This inference in favour of vesting is not necessarily excluded by the fact that the mode of application of the interest may come to an end before the specified event, as, for example, where the interest is to be applied for education alone⁵, or where interest is payable only during minority but payment of capital is to be at some greater age⁶. In general, however, if there necessarily occurs an interval or gap which separates the gift of income from the gift of capital, the gift of capital is not vested⁷ unless there are other indications to that effect⁸.

1 *Watson v Hayes* (1839) 5 My & Cr 125 at 133 per Lord Cottenham LC.

2 *Pulsford v Hunter* (1792) 3 Bro CC 416 at 419; *Leake v Robinson* (1817) 2 Mer 363 at 386. Instances are a gift of a fixed annual sum for maintenance, even when payable out of the interest of the legacy (*Watson v Hayes* (1839) 5 My & Cr 125; *Boughton v Boughton* (1848) 1 HL Cas 406 at 434; cf *Livesey v Livesey* (1830) 3 Russ 542), or a gift of a 'handsome allowance' (*Tawney v Ward* (1839) 1 Beav 563), or a gift of a yearly sum not to exceed the interest on the legacy (*Rudge v Winnall* (1849) 12 Beav 357). The doubt thrown on the observations in *Pulsford v Hunter* supra in *Fox v Fox* (1875) LR 19 Eq 286 at 289 per Jessel MR does not appear to be well founded: see *Wilson v Knox* (1884) 13 LR Ir 349 at 356 per Porter MR.

3 A gift of interim maintenance does not make vested a gift which in the whole context is clearly contingent: *Butcher v Leach* (1843) 5 Beav 392; *Re Coleman, Henry v Strong* (1888) 39 ChD 443, CA.

4 *Hoath v Hoath* (1785) 2 Bro CC 3; *Walcott v Hall* (1788) 2 Bro CC 305; *Hanson v Graham* (1801) 6 Ves 239; *Branstrom v Wilkinson* (1802) 7 Ves 421 (father appointed trustee during minority); *Lane v Goudge* (1803) 9 Ves 225; *Rose v Sowerby* (1830) Taml 376; *Lister v Bradley* (1841) 1 Hare 10 at 13 (interest payable to mother of legatees for their support and education); *Brocklebank v Johnson* (1855) 20 Beav 205 at 211; *Re Hart's Trust, ex p Block* (1858) 3 De G & J 195; *Shrimpton v Shrimpton* (1862) 31 Beav 425 at 427; *Re Holt's Estate, Bolding v Strugnell* (1876) 45 LJ Ch 208; *Re Bunn, Isaacson v Webster* (1880) 16 ChD 47; *Re Byrne, Byrne v Kenny* (1889) 23 LR Ir 260 (gift to each of a group); *Brennan v Brennan* [1894] 1 IR 69 at 73; *Re Williams, Williams v Williams* [1907] 1 Ch 180 at 183.

5 *Dodson v Hay* (1791) 3 Bro CC 405 at 409-410.

6 See *Davies v Fisher* (1842) 5 Beav 201; *Milroy v Milroy* (1844) 14 Sim 48 at 55; *Harrison v Grimwood* (1849) 12 Beav 192; *Tatham v Vernon* (1861) 29 Beav 604. See generally para 537 ante.

7 *Hanson v Graham* (1801) 6 Ves 239 at 250; *Tawney v Ward* (1849) 1 Beav 563; *Thomas v Wilberforce* (1862) 31 Beav 299 at 302 per Lord Romilly MR; *Pearson v Dolman* (1866) LR 3 Eq 315 at 321 per Wood V-C (gift defeasible on alienation).

8 *Pearman v Pearman* (1864) 33 Beav 394 at 396.

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716. Direction to pay whole or part of income.

Where a donee is a named individual, the legacy becomes vested nonetheless if in the direction to pay the whole interest in the meantime there is an additional direction that the trustees are to pay the whole or such part of that interest as they think fit for the donee's maintenance¹. A similar rule prevails as to gifts to a number of persons as a group and not as a class if the direction applies to their respective shares or interests².

1 See *Re Rouse's Estate* (1852) 9 Hare 649; *Re Sanderson's Trust* (1857) 3 K & J 497 at 507; *Re Parker, Barker v Barker* (1880) 16 ChD 44 at 46 per Jessel MR; *Re Williams, Williams v Williams* [1907] 1 Ch 180 at 183; *Re Ussher, Foster v Ussher* [1922] 2 Ch 321 at 329-331.

2 *Re Gossling, Gossling v Elcock* [1903] 1 Ch 448, CA; *Re Livingston* (1907) 14 OLR 161. Cf *Re Barnshaw's Trusts* (1867) 15 WR 378.

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717. Class gift with direction to apply the whole income.

Where there is a gift to a class at a specified age, with a direction to apply the whole income of each presumptive share for the maintenance or benefit of the corresponding member of the class, the members of the class in general take vested interests irrespective of their attaining the age¹, even if the trustees have a discretion as to the mode of application of such share of the interest². This rule does not apply where the gift for maintenance is not out of each share of the fund for the benefit of the corresponding member of the class, but is a general gift for maintenance of the whole class out of the whole undivided interest of the fund³.

1 *Dodson v Hay* (1791) 3 Bro CC 405; *Bell v Cade* (1861) 2 John & H 122.

2 *Perrott v Davies* (1877) 38 LT 52 (where a direction to apply the income for the respective maintenance of the children as the trustees should think proper was construed as referring to respective shares). As to a discretion as to the amount applied see PARA 718 post.

3 *Taylor v Bacon* (1836) 8 Sim 100; *Southern v Wollaston* (1852) 16 Beav 166; *Tracy v Butcher* (1857) 24 Beav 438; *Lloyd v Lloyd* (1856) 3 K & J 20 (explaining *Jones v Mackilwain* (1826) 1 Russ 220); *Re Hunter's Trusts* (1865) LR 1 Eq 295 at 298; *Re Ashmore's Trusts* (1869) LR 9 Eq 99 (not affected on this point by *Fox v Fox* (1875) LR 19 Eq 286); *Re Morris, Salter v A-G* (1885) 52 LT 840; *Re Martin, Tuke v Gilbert* (1887) 57 LT 471. See also the cases cited in PARA 718 note 6 post. Cf *Parker v Golding* (1843) 13 Sim 418.

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718. Class gift with direction to apply the whole or part of the income.

Even where the direction accompanying a gift to a class at a specified age is to apply the income of the presumptive share of each member, or so much of that income as the trustees think proper, for his maintenance until payment, it is possible¹ to draw the inference that the members take vested interests independently of attaining that age², at all events if the context does not show the contrary³ and assists that inference⁴. A trust that at the discretion of the trustees a sufficient part of the income of the presumptive shares should be applied in maintenance has been considered insufficient to render the gift of capital a vested gift⁵. In general the distinction for this purpose between gifts to named individuals and a gift to a class appears to be that a gift to a named person, although in terms contingent, is vested if there is a direction to pay the interest to him in the meantime, even if there is an additional direction that the trustees are to pay the whole or such part of the interest as they think fit. However, in the case of a gift to a class which in terms is contingent on the attaining of a specified age, a direction to apply the whole or part of the income of the fund in the meantime for the maintenance of the whole class does not vest an interest in a member of the class who does not attain a specified age⁶.

1 *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693 at 699 per Parker J.

2 *Fox v Fox* (1875) LR 19 Eq 286 at 290-291 (dissenting in this respect from *Re Ashmore's Trusts* (1869) LR 9 Eq 99; and following *Harrison v Grimwood* (1849) 12 Beav 192, 18 LJ Ch 485). It was pointed out in *Wilson v Knox* (1884) 13 LR Ir 349, that no such question arose for decision in *Fox v Fox* supra, since the gift of income was by reference to the presumptive shares of the donees; but that case (although doubted in *Dewar v Brooke* (1880) 14 ChD 529 at 532; *Re Martin, Tuke v Gilbert* (1887) 57 LT 471 at 474; *Brennan v Brennan* [1894] 1 IR 69 at 73; *Re Wintle, Tucker v Wintle* [1896] 2 Ch 711 at 715, 719) was considered by Lindley MR and Jeune P in *Re Turney, Turney v Turney* [1899] 2 Ch 739 at 747-748, CA, to be good sense and good law; and it was followed, as laying down the rule described in the text, in *Re Eichardt, Brebner v O'Meara* (1905) 25 NZLR 374, *Re Levy, Cohen v Cohen* (1907) 7 SRNSW 885 and *Re Ussher, Foster v Ussher* [1922] 2 Ch 321. See also *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239; and note 4 infra.

3 Thus the inference is excluded where the class is clearly a contingent class, with the specified age forming part of the description of the class: *Re Ricketts, Ricketts v Ricketts* (1910) 103 LT 278; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693.

4 *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239. In *Fox v Fox* (1875) LR 19 Eq 286, the construction in favour of vesting was also indicated by a gift over (see PARA 722 post).

5 See *Vawdry v Geddes* (1830) 1 Russ & M 203 at 207 (where there was also an alternative trust for accumulation); *Boreham v Bignall* (1850) 8 Hare 131 (where the will contained an advancement clause relating to presumptive shares); *Hardcastle v Hardcastle* (1862) 1 Hem & M 405 at 410 per Wood V-C.

6 *Re Grimshaw's Trusts* (1879) 11 ChD 406; *Re Parker, Barker v Barker* (1880) 16 ChD 44; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197 at 201. See also *Bowyer v West* (1871) 24 LT 414; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693. The position is similar even when the direction is to apply the whole income: see the text and notes 1-4 supra.

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719. Where gift remains contingent.

A mere discretionary power to apply income for maintenance is not sufficient to vest a gift, whether the donee is a class¹, an individual² or a group of persons taking not as a class³, and whether there is⁴ or is not⁵ a direction to accumulate the income not so applied for the benefit of persons who ultimately attain a vested interest. Moreover, where the gift is a specific or general legacy and interest is given for maintenance pending the donee reaching a specified age, but under the other provisions of the will there is no possibility of the separation of the subject matter of the gift from the rest of the testator's estate, the inference is that the gift remains contingent⁶.

1 *Leake v Robinson* (1817) 2 Mer 363; *Marquis of Bute v Harman* (1846) 9 Beav 320 (but see *Southern v Wollaston* (1852) 16 Beav 166 at 168n); *Re Thatcher's Trusts* (1859) 26 Beav 365 at 369; *Dewar v Brooke* (1880) 14 ChD 529; *Re Wintle, Tucker v Wintle* [1896] 2 Ch 711; *Re Ricketts, Ricketts v Ricketts* (1910) 103 LT 278; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693 at 699.

2 *Russell v Russell* [1903] 1 IR 168. The decision to the contrary in *Eccles v Birkett* (1850) 4 De G & Sm 105, where no reasons were given, was explained in *Locke v Lamb* (1867) LR 4 Eq 372 at 379, on the ground of the gift being a gift of interest. Cf *Re Jobson, Jobson v Richardson* (1889) 44 ChD 154 at 157; *Re Rogers, Lloyds Bank Ltd v Lory* [1944] Ch 297, [1944] 2 All ER 1, CA. See also *Harrison v Tucker* [2003] EWHC 1168 (Ch), [2003] All ER (D) 341 (May), [2003] WTLR 883.

3 *Wilson v Knox* (1884) 13 LR Ir 349.

4 See *Pickford v Brown, Brown v Brown* (1856) 2 K & J 426; *Merry v Hill* (1869) LR 8 Eq 619; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693.

5 *Re Wintle, Tucker v Wintle* [1896] 2 Ch 711.

6 *Re Lord Nunburnholme, Wilson v Nunburnholme* [1912] 1 Ch 489, CA. See also *Cromek v Lumb* (1839) 3 Y & C Ex 565 at 576 per Alderson B, approving 1 Roper on Legacies (3rd Edn) 500, which explained *Batsford v Kebbell* (1797) 3 Ves 363 (cited in PARA 714 note 9 ante).

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(D) SEVERANCE FROM THE ESTATE

720. Direction for severance from testator's estate.

Prima facie, the circumstance that a testator has expressly or impliedly directed that, for the purpose of the gift, the legacy fund is to be severed, either immediately or on any intermediate event, from his general estate is sufficient to show that the further postponement of enjoyment is not for the purpose of making the gift contingent¹. For this purpose, it is a sufficient separation if, as a matter of bookkeeping or physically, the trustees properly set apart the property as being property to which no one but the donee has any right to look, subject, if necessary, to the right to resort to it to satisfy the testator's debts².

1 *Branstrom v Wilkinson* (1802) 7 Ves 421 (appointment of separate trustee); *Saunders v Vautier* (1841) Cr & Ph 240 at 248; *Lister v Bradley* (1841) 1 Hare 10 at 13; *Greet v Greet* (1842) 5 Beav 123; *Strother v Dutton* (1857) 1 De G & J 675 at 676; *Dundas v Wolfe Murray* (1863) 1 Hem & M 425 at 431-432 per Wood V-C (where it was said that the mere fact of the fund being severed is not the essential point but rather that it must be a severance connected with the legacy itself); *Parsons v Peters* (1864) 13 WR 214; *Re Wrey, Stuart v Wrey* (1885) 30 ChD 507 at 509; *Re Bevan's Trusts* (1887) 34 ChD 716 at 718; *Brennan v Brennan* [1894] 1 IR 69 at 72.

- 2 *Re Lord Nunburnholme, Wilson v Nunburnholme* [1912] 1 Ch 489 at 497, CA, per Buckley LJ.

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(E) EFFECT OF GIFT OVER

721. Gifts over.

The circumstance of a gift of property being followed by a gift over¹ to another donee on a certain contingency does not alone prevent the first gift from vesting in the meantime, and, although it may be called in aid of other circumstances for that purpose², the effect of the gift over may be to vest the first gift³. This result does not, however, follow irrespective of other contingencies attached to the original gift⁴.

- 1 As to gifts over by necessary implication see PARA 752 post.

- 2 *Shepherd v Ingram* (1764) Amb 448; *Skey v Barnes* (1816) 3 Mer 335 at 340 per Grant MR (criticising *Scott v Bargeman* (1722) 2 P Wms 68); *Davies v Fisher* (1842) 5 Beav 201 at 214; *Hardcastle v Hardcastle* (1862) 1 Hem & M 405 at 412; *Re M'Garrity, Ballance v M'Garrity* (1912) 46 ILT 175; *Re Campbell, Cooper v Campbell* (1919) 120 LT 562.

- 3 As to contingent gifts over generally see PARA 707 ante.

- 4 See *Malcolm v O'Callaghan* (1817) 2 Madd 349 at 354; *Malcolm v O'Callaghan* (1833) Coop temp Brough 73; *Re Thomson's Trusts* (1870) LR 11 Eq 146; *Re Gunning's Estate* (1884) 13 LR Ir 203.

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722. Failure to attain specified age.

Where a gift is made to an individual donee if he attains a specified age and a gift over is made in the event of the donee failing to attain that age, the gift over is treated as showing that the first gift is vested¹. Where there are indications in favour of the original gift being vested independently of the specified age, this confirms that the mere gift over does not prevent the vesting². Thus a gift over on death under the specified age without issue does not prevent vesting³; and if the original gift is to a class and the gift over refers to the shares of those dying under that age, the inference is that the original gift is vested⁴.

In a gift to a class, the gift over may show that a person not attaining the specified age is nevertheless to take or to be treated as taking a share as a member of the class, and that that share is given over in the specified events; accordingly, the attainment of the specified age is not then a condition precedent to vesting⁵.

- 1 See *Re Heath, Public Trustee v Heath* [1936] Ch 259; and PARA 707 ante. See also *O'Reilly v Walsh* (1872) IR 6 Eq 555; *Re Bateman's Trusts* (1873) LR 15 Eq 355. Distinguish, however, *Re Edwards, Jones v Jones* [1906] 1 Ch 570 (where the gift was to a child who attained 21 and that condition was thus part of the description of the donee); *Re Mallinson's Consolidated Trusts, Mallinson v Gooley* [1974] 2 All ER 530, [1974] 1 WLR 1120 (where the gift over was in the terms 'subject as aforesaid' and the initial gift was held to be contingent). See

also PARA 723 post. At one time a different view from that stated in the text was taken: see *Vawdry v Geddes* (1830) 1 Russ & M 203 at 208 per Leach MR; *Bland v Williams* (1834) 3 My & K 411 at 417 per Leach MR; *Festing v Allen* (1844) 5 Hare 573 at 577 per Wood V-C.

2 *Davies v Fisher* (1842) 5 Beav 201 at 214; *Hardcastle v Hardcastle* (1862) 1 Hem & M 405 at 412; *Re Baxter's Trusts* (1864) 4 New Rep 131. In *Ridgway v Ridgway* (1851) 4 De G & Sm 271, the question was not the vesting of the gift but the application of the intermediate income.

3 *Bland v Williams* (1834) 3 My & K 411; *Harrison v Grimwood* (1849) 12 Beav 192 (see PARA 707 ante); *Mytton v Boodle* (1834) 6 Sim 457; *Phipps v Ackers* (1842) 9 Cl & Fin 583, HL (see PARA 703 ante) (where the question addressed to the judges omitted the words 'without leaving issue' in order, apparently, to have the case of *Doe d Hunt v Moore* (1811) 14 East 601 (real estate: see PARA 707 ante) reconsidered); *Wetherell v Wetherell* (1863) 1 De GJ & Sm 134; *Whitter v Bemridge* (1866) LR 2 Eq 736 (where there was a gift of residuary real and personal estate on trust to sell and invest, and pay 'the property and interest arising therefrom to A on his attaining the age of 24; but in case of his not attaining that age, or leaving male issue, I give, devise and bequeath the properties to other persons'; and it was held that A took an absolute vested interest in the testator's estate which was liable to be divested in the events mentioned in the will).

4 If the gift over is to a stranger and not to the other members of the class, the inference is that the person not attaining the specified age is nevertheless to take a share as a member of the class (see the cases cited in note 5 infra); and if the gift over is an accruer clause in favour of the other members of the class, the inference is the same in order that the accruer clause may not be useless (see *Re Edmondson's Estate* (1868) LR 5 Eq 389; *Re Gunning's Estate* (1884) 13 LR Ir 203).

5 *Berkeley v Swinburne* (1848) 16 Sim 275 at 284; *Taylor v Frobisher* (1852) 5 De G & Sm 191 at 199; *Fox v Fox* (1875) LR 19 Eq 286 at 291; *Re Turney, Turney v Turney* [1899] 2 Ch 739 at 746, 748, CA.

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723. Gift over on parent's death without issue.

Where a gift is made to the children generally of a named person at a specified age (and, therefore, prima facie contingently on attaining that age), a gift over on the parent's death without issue does not of itself render the gift vested without regard to the attainment of that age¹. However, in gifts to a class of children surviving their parent at such an age, a similar gift over has sometimes given rise to the inference that the attainment of that age was not a condition precedent².

1 *Walker v Mower* (1852) 16 Beav 365; *Re Wrangham's Trust* (1860) 1 Drew & Sm 358; *Kidman v Kidman* (1871) 40 LJ Ch 359; *Re Edwards, Jones v Jones* [1906] 1 Ch 570 at 573, CA; *Re Ricketts, Ricketts v Ricketts* (1910) 103 LT 278; *Re Campbell, Cooper v Campbell* (1919) 120 LT 562.

2 *Bree v Perfect* (1844) 1 Coll 128 (followed in *Ingram v Suckling* (1859) 7 WR 386; *Re Bevan's Trusts* (1887) 34 ChD 716 at 719). *Bree v Perfect* supra has not, however, always been accepted as correct: see *Re Edwards, Jones v Jones* [1906] 1 Ch 570 at 572, CA, per Romer LJ.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/F. LEGACIES CHARGED ON REAL ESTATE OR A MIXED FUND/724. Charge on real estate.

F. LEGACIES CHARGED ON REAL ESTATE OR A MIXED FUND

724. Charge on real estate.

So far as they are charged on real estate, legacies *prima facie*¹ do not vest until the time fixed for payment² and fail if the donee dies before that time, even though interest is given in the meantime³. If, however, the payment is clearly postponed, not for reasons personal to the donee but for the benefit of the estate⁴ or merely in order to let in a prior life or other limited interest⁵, then the legacies vest at once. This rule applies generally, whether the land is the primary or the auxiliary fund and whether the gift is for a portion or is merely a general legacy, and whether the donee is a child or a stranger⁶.

1 For cases where the context showed an intention excluding this presumption see *Watkins v Cheek* (1825) 2 Sim & St 199; *Hudson v Forster* (1841) 2 Mont D & De G 177; *Brown v Wooler* (1843) 2 Y & C Ch Cas 134.

2 *Lady Poulet v Lord Poulet* (1685) 1 Vern 204 at 321; *Smith v Smith* (1688) 2 Vern 92; *Yates v Phettiplace* (1700) 2 Vern 416; *Carter v Bletsoe* (1708) 2 Vern 617; *Langley v Oates* (1708) 2 Eq Cas Abr 541 pl 7; *Jennings v Looks* (1725) 2 P Wms 276; *Rich v Wilson* (1728) Mos 68; *Duke of Chandos v Talbot* (1731) 2 P Wms 601 at 610; *Hall v Terry* (1738) 1 Atk 502; *Re Hudson's Minors* (1843) Drury temp Sug 6; *Davidson v Proctor* (1849) 19 LJ Ch 395; *Bolton v Bolton* (1861) 12 I Ch R 233; *Taylor v Lambert* (1876) 2 ChD 177. See also Tudor, LC Real Prop (4th Edn) 434. Cf *Gordon v Raynes* (1732) 3 P Wms 134.

3 *Gawler v Standerwick* (1788) 2 Cox Eq Cas 15; *Harrison v Naylor* (1790) 2 Cox Eq Cas 247; *Pearce v Loman*, *Pearce v Taylor* (1796) 3 Ves 135; *Parker v Hodgson* (1861) 1 Drew & Sm 568. See also *Smith v Smith* (1688) 2 Vern 92; *Boycot v Cotton* (1738) 1 Atk 552 at 555. Cf *Phipps v Lord Mulgrave* (1798) 3 Ves 613.

4 *Lowther v Condon* (1741) 2 Atk 127 at 128; *Manning v Herbert* (1769) Amb 575 at 576; *Clark v Ross* (1773) 2 Dick 529; *Kemp v Davy* (1774) 1 Bro CC 120n; *Murkin v Phillipson* (1834) 3 My & K 257 at 261; *Goulbourn v Brooks* (1837) 2 Y & C Ex 539 at 543; *Evans v Scott* (1847) 1 HL Cas 43 at 57; *Goodman v Drury* (1852) 21 LJ Ch 680 (where, however, the context excluded the presumption arising from the prior life estate); *Remnant v Hood* (1860) 2 De GF & J 396 at 410-411; *Haverty v Curtis* [1895] 1 IR 23 at 34.

5 *King v Withers* (1735) Cas temp Talb 117; *Tunstall v Brachen* (1753) Amb 167; *Embrey v Martin* (1754) Amb 230; *Jeale v Titchener* (1771) Amb 703; *Dawson v Killet* (1781) 1 Bro CC 119; *Godwin v Munday* (1783) 1 Bro CC 191; *Bayley v Bishop* (1803) 9 Ves 6; *Poole v Terry* (1831) 4 Sim 294.

6 *Duke of Chandos v Talbot* (1731) 2 P Wms 601 at 612n. As to portions generally see SETTLEMENTS vol 42 (Reissue) PARA 727 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(ii) Vesting/F. LEGACIES CHARGED ON REAL ESTATE OR A MIXED FUND/725. Charge on mixed fund.

725. Charge on mixed fund.

Formerly, where legacies were charged both on real and on personal estate, the personal estate *prima facie* was applied first towards payment and the real estate only in aid of it. So far as the personal estate was applied towards payment, the vesting of the legacies was governed by the ordinary rules¹ applying to bequests of pure personal estate alone²; and, so far as it was necessary to resort to the real estate, the vesting was governed by the rules³ applying to legacies charged on real estate alone⁴. Now, however, where the testator's real and personal estate have been given as a mixed fund for payment of legacies, these are, in the absence of a contrary intention, borne by the real and personal estate rateably, and the rules as to vesting in the case of personal estate probably apply to the whole⁵.

1 As to these rules see PARA 709 ante.

2 *Re Hudson's Minors* (1843) Drury temp Sug 6.

3 As to these rules see PARA 724 ante.

4 *Duke of Chandos v Talbot* (1731) 2 P Wms 601 at 612n; *Prowse v Abingdon* (1738) 1 Atk 482; *Van v Clark* (1739) 1 Atk 510; *Parker v Hodgson* (1861) 1 Drew & Sm 568. Where the legatee died before the time of payment, his personal representatives might be entitled so far as the personal estate was concerned: *Richardson v Greese* (1743) 3 Atk 65 at 69; *Anon* (1744) 2 Eq Cas Abr 551 pl 33.

5 As to the order of application of assets, and as to the exclusion of the statutory order by the creation of a mixed fund see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 410, 416 et seq.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(iii) Divesting/726. Divesting in general.

(iii) Divesting

726. Divesting in general.

In a doubtful case¹ the court leans against the divesting of vested interests² and favours that construction which leads to the vesting indefeasibly of the property as early as possible³. In general, therefore, subject to the intention shown by the will as a whole⁴, divesting conditions are construed strictly⁵, and, where there is a prior vested gift and then a clause divesting the gift in a specified contingency, the court does not hold the gift divested unless the precise contingency referred to occurs, and does not introduce other contingencies unless the context requires that course⁶.

1 The rule is inapplicable where the intention as to divesting is plainly shown: see *Re Ball, Slattery v Ball* (1888) 40 ChD 11 at 13, CA; and PARA 727 note 11 post.

2 *Maddison v Chapman* (1858) 4 K & J 709 at 721, 723; *Re Wood, Moore v Bailey* (1880) 43 LT 730 at 732; *Re Roberts, Percival v Roberts* [1903] 2 Ch 200 at 204.

3 *Minors v Battison* (1876) 1 App Cas 428, HL; *Re Teale, Teale v Teale* (1885) 53 LT 936 at 937.

4 *Lady Langdale v Briggs* (1856) 8 De GM & G 391 at 429-430. As to shifting clauses (otherwise known as forfeiture or defeasance clauses) see SETTLEMENTS vol 42 (Reissue) PARA 740; and as to miscellaneous uncertain conditions attached to gifts see PARA 432 ante.

5 *Fraunces' Case* (1609) 8 Co Rep 89b at 90b; *Kiallmark v Kiallmark* (1856) 26 LJ Ch 1 at 4; *Blagrove v Bradshaw* (1858) 4 Drew 230 at 235. The principle applies not only to the divesting of vested estates but also to the defeating of contingent estates: *Kiallmark v Kiallmark* supra at 4. Accordingly, in cases of gifts to children of a named parent followed by a gift over if all the children die in the lifetime of their parent, where some but not all survive their parent, all take: *Bromhead v Hunt* (1821) 2 Jac & W 459; *Gordon v Hope* (1849) 3 De G & Sm 351 (settlement); *Templeman v Warrington* (1842) 13 Sim 267 at 270 (gift over, if but one child at parent's decease, to that one); *Re Firth, Loveridge v Firth* [1914] 2 Ch 386; *Re Stephens, Tomalin v Tomalin's Trustee* [1927] 1 Ch 1, CA. As to divesting in the case of a condition subsequent see PARAS 698, 707 ante.

6 *Tarback v Tarback* (1835) 4 LJ Ch 129; *Cox v Parker* (1856) 22 Beav 168; *Potts v Atherton* (1859) 28 LJ Ch 486 at 488; *Re Kirkbride's Trusts* (1866) LR 2 Eq 400 at 402; *Re Pickworth, Snaith v Parkinson* [1899] 1 Ch 642, CA; *Re Searle, Searle v Searle* [1905] WN 86. As to the change of conjunctions in particular cases see PARA 728 post.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(iii) Divesting/727. Gift over on death 'without leaving children'.

727. Gift over on death 'without leaving children'.

Where there is a gift to a named person for life and after his death to his children, either generally or on attaining any age or on any other event¹, in terms which give the children a vested absolute interest independently of whether the children survive their parent or not², followed by a gift over if the parent dies 'without leaving children', these words are construed so as not to destroy any prior vested interest³, and are read as 'without having children'⁴, or 'without having had children'⁵, or 'without having had a child who attained a vested interest'⁶, according to the context.

The rule is not confined to a case in which the life tenant is the parent of or stands in loco parentis to the donee in remainder, but extends to a case in which the life tenant is a complete stranger⁷, and, it seems, to a case in which the children mentioned in the gift over take no interest but there is an interest in their parent⁸, or in any one else⁹, independent of the children surviving their parent, and where the result of reading the words in their ordinary sense would be to divest interests which the testator apparently intended to remain vested. The rule is not affected by the circumstances that the testator knew of the existence of a child of the named person, and that such knowledge appears on the face of the will itself¹⁰. The rule is inapplicable where the context shows that the prior vested interests were intended to be destroyed in accordance with the plain meaning of the words¹¹, or where the subject matter of the gift is an annuity bequeathed so as to involve the notion of personal enjoyment by each of the successive donees¹². Moreover, the rule does not necessarily apply where there is a disposition in a settlement in default of appointment and the subsequent provision in the event of death without having children is in a will or codicil exercising the power of appointment¹³.

1 Eg in cases where the interest of the children is to vest at birth (*Treharne v Layton* (1875) LR 10 QB 459, Ex Ch; *Re Bradbury, Wing v Bradbury* (1904) 73 LJ Ch 591, CA; *Re Goldney, Re Dighton, Clarke v Dighton* (1911) 130 LT Jo 484), or at the age of majority (*Maitland v Chalie* (1822) 6 Madd 243; *Re Thompson's Trust, ex p Oliver* (1852) 5 De G & Sm 667), or at that age or marriage (*Casamajor v Strobe* (1843) 8 Jur 14), or when the youngest attains the age of majority (*Kennedy v Sedgwick* (1857) 3 K & J 540), or any similar event if only the vesting is without reference to the surviving of the parent (*Barkworth v Barkworth* (1906) 75 LJ Ch 754 at 756 per Joyce J).

2 The rule is, therefore, inapplicable where the interests of the children are contingent on their surviving their parents: *Bythesea v Bythesea* (1854) 23 LJ Ch 1004; *Sheffield v Kennett* (1859) 4 De G & J 593; *Re Watson's Trusts* (1870) LR 10 Eq 36 (where *Bryden v Willett* (1869) LR 7 Eq 472 is criticised). See also *Re Heath's Settlement* (1856) 23 Beav 193; *Pride v Fooks* (1858) 3 De G & J 252; *Chadwick v Greenall* (1861) 7 Jur NS 959; *Young v Turner* (1861) 1 B & S 550; *Jeyes v Savage* (1875) 10 Ch App 555 (settlement). A non-exclusive power of appointment by the parent does not, however, exclude the rule: see *Re Jackson's Will* (1879) 13 ChD 189; *Barkworth v Barkworth* (1906) 75 LJ Ch 754; *Re Simmons, Dennison v Orman* (1902) 87 LT 594.

3 *Re Cobbold, Cobbold v Lawton* [1903] 2 Ch 299, CA (report corrected in *Re Davey, Prisk v Mitchell* [1915] 1 Ch 837 at 847n, CA); *Chunilal Parvatishankar v Bai Samrath* (1914) 30 TLR 407, PC; *Re MacAndrew's Will Trusts, Stephens v Barclays Bank Ltd* [1964] Ch 704, [1963] 2 All ER 919.

4 *Re Buckinghamshire Rly Co, Re Tookey's Trusts, ex p Hooper* (1852) 1 Drew 264; *Kennedy v Sedgwick* (1857) 3 K & J 540; *White v Hill* (1867) LR 4 Eq 265; *Re Brown's Trust* (1873) LR 16 Eq 239; *Re Jackson's Will* (1879) 13 ChD 189 at 194 per Jessel MR.

5 *Marshall v Hill* (1814) 2 M & S 608 at 615; *Bryden v Willett* (1869) LR 7 Eq 472 at 476; *Treharne v Layton* (1875) LR 10 QB 459 at 461, Ex Ch.

6 See *Re Milling's Settlement, Peake v Thom* [1944] Ch 263 at 268, [1944] 1 All ER 541 at 544, stating the rule in *Maitland v Chalie* (1822) 6 Madd 243 in the amended form as formulated in *Re Cobbold, Cobbold v Lawton* [1903] 2 Ch 299, CA (see the text and note 3 supra).

7 *Casamajor v Strobe* (1843) 8 Jur 14.

8 *Re Bogle, Bogle v Yorstoun* (1898) 78 LT 457 (where the gift was to the parent for life and afterwards to his executors and administrators contingently on the parent having two or more children attaining 21 years).

9 *Re Jackson's Will* (1879) 13 ChD 189 at 194 per Jessel MR. See, however, *Armstrong v Armstrong* (1888) 21 LR Ir 114, Ir CA (where it was held that the words 'without leaving' may be read 'without having had' where the result of so doing is to make the whole instrument consistent and where the contrary construction would have

the effect of divesting a previously vested gift in a manner inconsistent with the expressed intention of the testator; but they will not be so read for the purpose of altering the event on which the divesting of a gift previously vested is to take place).

10 *Re Cobbold, Cobbold v Lawton* [1903] 2 Ch 299, CA (see note 3 supra).

11 *Re Ball, Slattery v Ball* (1888) 40 ChD 11 at 13, CA. See, however, *Barkworth v Barkworth* (1906) 75 LJ Ch 754 at 756 (where it is suggested that the relevant sentence properly should not appear in the report of *Re Ball, Slattery v Ball* supra). Cf *Hedges v Harpur, Hedges v Blick* (1858) 3 De G & J 129 at 141; *Clay v Coles* (1887) 57 LT 682 at 683-684 per Stirling J; *Re Hamlet, Stephen v Cunningham* (1888) 39 ChD 426, CA. Thus, the rule does not generally apply to a gift to a person absolutely followed by a gift over on his death without leaving issue: *Armstrong v Armstrong* (1888) 21 LR Ir 114, Ir CA; *Re Ball, Slattery v Ball* supra, disapproving *White v Hight* (1879) 12 ChD 751. See also *Re Hambleton, Hamilton v Hambleton* [1884] WN 157; but cf *Re Bogle, Bogle v Yorstoun* (1898) 78 LT 457.

12 *Re Hemingway, James v Dawson* (1890) 45 ChD 453 at 456.

13 *Re Milling's Settlement, Peake v Thom* [1944] Ch 263, [1944] 1 All ER 541.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(4) CONDITIONAL GIFTS/(iii) Divesting/728. Construction of 'or' as 'and'.

728. Construction of 'or' as 'and'.

If there is a devise to a named person in fee simple¹ or a bequest to a named person absolutely² with a gift over in either case if he dies without children or under the age of majority to other donees, 'or' is read as 'and', and the gift over does not take effect unless both events happen. This rule of construction depends on the testator's presumed intention to benefit the children of the devisee directly or indirectly, an intention which would be defeated if the devisee were to die under the age of majority leaving children and 'or' were construed disjunctively³. The alteration is made even if the sentence as altered contains a condition repugnant to the character of the estate given⁴. A similar rule holds good as to gifts over if the donee in question dies before a life tenant under a previous gift or without issue⁵.

This rule of construction is also applicable where the prior devise or bequest is contingent on the donee leaving issue⁶, or on his attaining majority⁷, if he takes absolutely.

Where, however, a prior donee takes for life only and his issue take express absolute interests and there is a similar gift over, this alteration cannot be adopted so as to defeat the interests of subsequent takers⁸. Where a prior donee takes in tail⁹ or takes for life only with remainder to his issue as purchasers in tail¹⁰, a gift over on his death under age or on the failure of his issue may be read without the alteration of 'or' to 'and'; but even in this case a death under the specified age does not in general carry the estate over unless there is also a failure of issue, as the gift over would not be read so as to defeat any issue in tail¹¹. A death without issue, although after attaining that age, may, however, carry the estate over by way of remainder¹² or otherwise.

On the same principle¹³, or to avoid inconsistency¹⁴, where a prior gift is absolute, or contingent on attaining a specified age or on marriage or on a specified age or marriage as alternative events, a gift over on the donee's death before attaining that age or marriage is read as if 'or' were 'and'.

Where the interest of a donee is postponed to a life interest but is contingent only on his attaining a certain age and not on his surviving the life tenant, a gift over on his death before the life tenant or under the specified age is construed as if 'or' were 'and'¹⁵.

1 *Price v Hunt* (1684) Poll 645; *Fairfield v Morgan* (1805) 2 Bos & PNR 38; *Eastman v Baker* (1808) 1 Taunt 174 at 182; *Right d Day v Day* (1812) 16 East 67; *Doe d Herbert v Selby* (1824) 2 B & C 926; *Morris v Morris* (1853) 17 Beav 198; *Mahaffy v Rooney* (1853) 5 Ir Jur 245; *Imray v Imeson* (1872) 26 LT 93. *Sowell v Garret* (1596) Moore KB 422 (accepted as an authority on this point in *Wright d Burrill v Kemp* (1789) 3 Term Rep 470 at 474 per Buller J and in *Denn d Wilkins v Kemeys* (1808) 8 East 366 at 367 per Le Blanc J) is referable to other grounds: see the decision as reported sub nom *Soulle v Gerrard* Cro Eliz 525; and note 11 infra.

2 The rule applies both to real and to personal estate: *Wright v Marsom* [1895] WN 148. See also *Weddell v Mundy* (1801) 6 Ves 341; *Mytton v Boodle* (1834) 6 Sim 457.

3 *Re Crutchley, Kidson v Marsden* [1912] 2 Ch 335 at 337 per Parker J. See, however, the doubts expressed in *Grey v Pearson* (1857) 6 HL Cas 61 at 80 per Lord Cranworth LC, who nevertheless approved of the rule as being an established rule. According to the structure of the sentence, if 'without' is used followed by two events both governed by 'without', the use of 'or' is correct (see *Stretton v Fitzgerald* (1889) 23 LR Ir 466 at 472-473 per Fitzgibbon LJ), and in such a case it is not necessary to alter the words.

4 Eg gifts over on the donee dying without issue or intestate: see *Incorporated Society in Dublin v Richards* (1841) 1 Dr & War 258 at 283; *Green v Harvey* (1842) 1 Hare 428; *Greathed v Greathed* (1859) 26 Beav 621 at 627 (gift over in event of 'any of them dying before having heirs of their body or making a particular disposition of his or her property'); *Re Crutchley, Kidson v Marsden* [1912] 2 Ch 335. Cf *Beachcroft v Broome* (1791) 4 Term Rep 441; *Cuthbert v Purrier* (1822) Jac 415; *Stretton v Fitzgerald* (1889) 23 LR Ir 466.

5 *Wright d Burrill v Kemp* (1789) 3 Term Rep 470; *Denn d Wilkins v Kemeys* (1808) 8 East 366.

6 *Johnson v Simcock* (1861) 7 H & N 344, Ex Ch.

7 *Mytton v Boodle* (1834) 6 Sim 457; *Wright v Marsom* [1895] WN 148.

8 *Cooke v Mirehouse* (1864) 34 Beav 27.

9 *Woodward v Glasbrook* (1700) 2 Vern 388; *Brownswood v Edwards* (1751) 2 Ves Sen 243 at 249 per Lord Hardwicke LC; *Mortimer v Hartley* (1848) 6 CB 819, (1851) 6 Exch 47, (1851) 3 De G & Sm 316 (where the Court of Chancery adopted the opinion of the Court of Exchequer and not that of the Court of Common Pleas after sending cases for the opinion of those courts); *Grey v Pearson* (1857) 6 HL Cas 61 at 93 per Lord St Leonards. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

10 *Hasker v Sutton* (1824) 9 Moore CP 2. See also note 9 supra.

11 *Soulle v Gerrard* (1596) Cro Eliz 525 (where the estate tail was implied from the gift over, and the subsequent limitation could not then have taken effect by way of executory devise). However, this case would now be decided otherwise. See also *Grey v Pearson* (1857) 6 HL Cas 61. The effect, so far as death under age is concerned, is, therefore, the same as if 'or' were read as 'and': cf *Monkhouse v Monkhouse* (1829) 3 Sim 119 at 126 (gift over on death or want of issue construed as on death and want of issue).

12 *Brownswood v Edwards* (1751) 2 Ves Sen 243; *Hasker v Sutton* (1824) 9 Moore CP 2 (where the remainder was held to be contingent). This appears to be the case also referred to in *Grey v Pearson* (1857) 6 HL Cas 61 at 93 per Lord St Leonards, but there described as the case of death 'under age leaving issue'.

13 This was the ground for the rule stated in *Re Clegg's Estate, ex p Evans* (1862) 14 I Ch R 70, Ir CA; *Re Cantillon's Minors* (1864) 16 I Ch R 301 at 311 (contingent on marriage); *Butler v Trustees, Executors and Agency Co Ltd* (1906) 3 CLR 435 at 443 (gift over on death before 21 unmarried and without issue).

14 This was the ground for the rule stated in *Grant v Dyer* (1813) 2 Dow 73 at 87, HL; *Malcolm v O'Callaghan* (1833) Coop temp Brough 73 at 76 (contingent on marriage with consent). See also *Thackeray v Hampson* (1825) 2 Sim & St 214; *Grimshawe v Pickup* (1839) 9 Sim 591; *Thompson v Teulon, Teulon v Teulon* (1852) 22 LJ Ch 243 (alternative events); *Collett v Collett* (1866) 35 Beav 312.

15 *Miles v Dyer* (1832) 5 Sim 435 (subsequent proceedings (1837) 8 Sim 330); followed, as laying down an established rule of construction, in *Bentley v Meech* (1858) 25 Beav 197.

729. Construction of 'and' as 'or'.

In general, the court is unwilling to change 'and' into 'or' in a gift over on several events connected by 'and' where the words may be given their ordinary sense, as the effect would be to divest the prior gift in events other than the compound event which the testator has provided for¹. Thus after a gift to a donee absolutely² or in tail³, or for life with remainder to his children⁴, a gift over on the donee dying under the age of majority and without issue is read in its ordinary sense, and is not read as if 'and' were 'or' merely for the possible benefit of the issue.

'And' may be construed as 'or' where one member of the sentence includes the other, so that, by construing the words literally, one member of the sentence would be rendered unnecessary, and the change is made in order to give effect to each member of the sentence. The majority of the cases have also been cases in which 'and' has been construed disjunctively in order to favour the vesting of a legacy and not in order to divest it⁵. The alteration is not, however, made if, by giving to one member of the sentence some less usual meaning, effect can be given to every word⁶. Thus if, after a gift to a person absolutely or for life and afterwards to his children, there is a gift over on his death 'unmarried and without issue', 'and' may be read as 'or' where 'unmarried' is necessarily given its ordinary meaning of 'never having been married'⁷; but as a rule, if in such a gift over 'unmarried' can be given the meaning 'without leaving a spouse'⁸, so as to give effect to all the words without altering the conjunctions, this construction is adopted rather than the words being altered⁹.

There is an additional objection to the change of 'and' to 'or' if, as a result, any part of the sentence becomes inoperative¹⁰.

1 *Doe d Usher v Jessep* (1810) 12 East 288 at 293; *Key v Key* (1855) 1 Jur NS 372 (where *Brown v Walker* (1824) 2 LJOS Ch 82 is commented on); *Reed v Braithwaite* (1871) LR 11 Eq 514; *Lillie v Willis* (1899) 31 OR 198; *Re Metcalfe, Metcalfe v Metcalfe* (1900) 32 OR 103.

2 *Coates v Hart* (1863) 32 Beav 349.

3 *Doe d Usher v Jessep* (1810) 12 East 288; approved in *Grey v Pearson* (1857) 6 HL Cas 61 (where *Brownsword v Edwards* (1751) 2 Ves Sen 243 is explained and the construction there adopted by Lord Hardwicke LC, which was similar to that where 'or' is used (see PARA 728 ante), was disapproved). Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

4 *Malcolm v Malcolm* (1856) 21 Beav 225.

5 *Day v Day* (1854) Kay 703 at 708 per Wood V-C.

6 As to the general rule to this effect see PARA 539 ante.

7 *Wilson v Bayly* (1760) 3 Bro Parl Cas 195, HL; *Hepworth v Taylor* (1784) 1 Cox Eq Cas 112; *Maberly v Strode* (1797) 3 Ves 450 at 454; *Bell v Phyn* (1802) 7 Ves 453 at 459 per Grant MR; *Carolyn v Carolyn* (1881) 17 LR Ir 25n; *Long v Lane* (1885) 17 LR Ir 24, Ir CA; *Roberts v Bishop of Kilmore* [1902] 1 IR 333 (where 'unmarried' was held to be used in this sense throughout the will). Cf *Mackenzie v King* (1848) 12 Jur 787 (where 'nor' was read 'or not').

8 As to this meaning see PARA 537 note 11 ante.

9 *Re Sanders' Trusts* (1866) LR 1 Eq 675; *Re King, Salisbury v Ridley* (1890) 62 LT 789; *Re Chant, Chant v Lemon* [1900] 2 Ch 345 at 348; *Re Jones, Last v Dobson* [1915] 1 Ch 246 (where 'unmarried and without lawful issue' was held to mean 'without leaving a widow'). Cf *Dillon v Harris* (1830) 4 Bli NS 321 at 365, 369, HL (where marriage with consent was intended). After a gift of realty in fee simple or an absolute gift of personalty, or a gift for life followed by a gift to the donee's children, a gift over on a prior donee dying a minor unmarried and without issue prima facie is construed as given on a single contingency, and the words are not to be read disjunctively unless the context requires. For this purpose, 'unmarried' is taken to mean 'without leaving a

spouse': *Doe d Everett v Cooke* (1806) 7 East 269 at 272. Cf *Framlingham v Brand* (1746) 3 Atk 390. Such a word as 'unmarried' in such a context cannot be struck out or left inoperative: *Doe d Baldwin v Rawding* (1819) 2 B & Ald 441. See also PARA 539 ante.

10 *Key v Key* (1855) 1 Jur NS 372; *Re Kirkbride's Trusts* (1866) LR 2 Eq 400 at 403.

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730. Survivorship clauses.

If there is a gift after a life estate to a number of persons as tenants in common¹ or alternatively to such of them as survive the life tenant, the survivorship clause prima facie is a divesting clause only, and, if none of the donees survives the life tenant, their representatives take². A similar rule applies where, after a gift to a number of persons as tenants in common, there is a gift on any contingency to the survivor of them; this is construed as conditional on his surviving the life tenant or some specified event³. This rule does not, however, apply where, in the context of the will, a gift to the survivor of a number of persons is construed as referring to survivorship among themselves and not as conditional on his surviving the life tenant; in such a case the longest liver takes the gift, even if all die in the lifetime of the life tenant⁴; nor does the rule apply where the condition as to surviving the life tenant applies to the original gift⁵.

The time of operation of a divesting provision may be limited by the context, for example by a direction for payment, transfer or conveyance to the donee or for the doing of any such act on any specified event⁶. The court considers that the trustees or executors could not conveniently obey such a direction if divesting were intended to take place after that event⁷.

1 If the gift is to a number of persons as joint tenants and the reference to survivorship is construed as expository of the previous words so as to make the gift contingent on surviving the life tenant, the rule does not apply: *Re Douglas's Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 3 All ER 785, [1959] 1 WLR 1212, CA.

2 *Browne v Lord Kenyon* (1818) 3 Madd 410; *Sturgess v Pearson* (1819) 4 Madd 411 (where there was a bequest to A of interest and dividends of personal property for life, and then to be equally divided among her three children or such of them as were living at her death; the children all died in the lifetime of the life tenant, and it was held that they took vested interests, transmissible to their representatives); *Belk v Slack* (1836) 1 Keen 238; *Wagstaff v Crosby* (1846) 2 Coll 746; *Page v May* (1857) 24 Beav 323; *Wiley v Chantepedrix* [1894] 1 IR 209; *Re Pickworth, Snaith v Parkinson* [1899] 1 Ch 642, CA; *Penny v Railways Comr* [1900] AC 628 at 634, PC; *Ward v Brown* [1916] 2 AC 121, PC; *Re Douglas's Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 3 All ER 785, [1959] 1 WLR 1212, CA. As to the meaning and ascertainment of survivors see PARAS 606, 609 ante.

3 *Harrison v Foreman* (1800) 5 Ves 207; *Peters v Dipple* (1841) 12 Sim 101; *Clarke v Lubbock* (1842) 1 Y & C Ch Cas 492 (surviving testator); *Eaton v Barker* (1845) 2 Coll 124; *Littlejohns v Household* (1855) 21 Beav 29; *Cambridge v Rous* (1858) 25 Beav 409; *Maddison v Chapman* (1861) 1 John & H 470; *Marriott v Abell* (1869) LR 7 Eq 478; *Re Deacon's Trusts, Deacon v Deacon, Hagger v Heath* (1906) 95 LT 701. See also *Benn v Dixon, Dixon v Nicholson, Dixon v Priestley* (1847) 16 Sim 21; *Re Sanders' Trusts* (1866) LR 1 Eq 675 at 683-684; *Re Clark's Trusts* (1870) LR 9 Eq 378; *Jones v Davies* (1880) 28 WR 455; *Young's Trustees v Young* 1927 SC (HL) 6.

4 *Scurfield v Howes* (1790) 3 Bro CC 90; *White v Baker* (1860) 2 De GF & J 55 (commented on, although accepted as correct, in *Re Pickworth, Snaith v Parkinson* [1899] 1 Ch 642, CA); *Re Wood, Hodge v Hull* (1923) 68 Sol Jo 186.

5 *Willis v Plaskett* (1841) 4 Beav 208.

6 See *Vulliamy v Huskisson* (1838) 3 Y & C Ex 80; *Doe d Lloyd v Davies* (1854) 23 LJCP 169. Subject to such a context, the operation of a divesting clause operates whenever the contingency happens on which it is to take effect: see eg *Witham v Witham* (1861) 3 De GF & J 758. As to particular gifts over see PARA 735 et seq post.

7 *Woodburne v Woodburne* (1850) 3 De G & Sm 643; *Glyn v Glyn* (1857) 26 LJ Ch 409; *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 403, 406; *Re Luddy, Peard v Morton* (1883) 25 ChD 394 at 397; *Re Kerr's Estate* [1913] 1 IR 214. This indication of intention may be overborne: see *Martineau v Rogers* (1856) 8 De GM & G 328 at 333.

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(iv) Gifts over by Inference

731. Gift over by necessary implication.

Where a testator has provided for the determination of an estate in any of two or more events and has then given a gift over expressly to take place in one only of those events, then, in the absence of any indication to the contrary¹, the court may necessarily imply an intention on the testator's part that the gift over is to take effect not merely on the specified event but on the happening of any of the events determining the previous estate².

The principle is applicable only where, after looking at all the relevant circumstances (including the will itself), the court comes to the conclusion that the testator must certainly have intended the disposition over to take effect in the event which has actually happened³. Accordingly, where the prior gift is conditional, for example on the donee attaining a particular age, and the condition is satisfied during the testator's lifetime, a gift over on non-fulfilment of the condition does not normally take effect, even though the prior donee dies before the testator causing the prior gift to lapse⁴.

1 An indication to the contrary was found in *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640, CA; *Chia Khwee Eng v Chia Poh Choon* [1923] AC 424, PC (explained in *Stewart v Murdoch* [1969] NI 78, on the basis of a gift of more than a life interest in the first instance).

2 *Jones v Westcomb* (1711) Prec Ch 316; *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664 at 666, CA. See also *Prestwidge v Groombridge* (1833) 6 Sim 171; *Lenox v Lenox* (1839) 10 Sim 400 at 409; *Wing v Angrave* (1860) 8 HL Cas 183 at 200; *Pride v Fooks* (1858) 3 De G & J 252 at 267; *Re Chappell's Trusts* (1862) 10 WR 573; *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640 at 656, CA, per Bowen LJ; *Re Bowen, Treasury Solicitor v Bowen* [1949] Ch 67, [1948] 2 All ER 979; *Re Riggall, Wildash v Riggall* [1949] WN 491; *Re Koeppler's Will Trusts, Barclays Bank Trust Co Ltd v Slack* [1984] Ch 243 at 263 et seq, [1984] 2 All ER 111 at 126 et seq per Peter Gibson J (revsd on other grounds [1986] Ch 423, [1985] 2 All ER 869, CA). The first-known case on this point is that of *Curius and Coponius* (BC 68) (Cicero, Oratio pro Cæcina, c 18), cited in *Wing v Angrave* supra at 200 per Lord Campbell LC and *Hall v Warren* (1861) 9 HL Cas 420 at 429-430 (affg *Warren v Rudall, Hall v Warren* (1858) 4 K & J 603 at 610, where the case of *Curius and Coponius* is fully quoted). As to the destination of accumulation of income prior to the vesting see *Re Woolf, Public Trustee v Lazarus* [1920] 1 Ch 184; *Re Ussher, Foster v Ussher* [1922] 2 Ch 321.

3 *Re Bailey, Barrett v Hyder* [1951] Ch 407 at 420, [1951] 1 All ER 391 at 397, CA (approving dicta of Romer LJ in *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664 at 669); *Re Robertson, Marsden v Marsden* (1963) 107 Sol Jo 318; *Re Koeppler's Will Trusts, Barclays Bank Trust Co Ltd v Slack* [1984] Ch 243 at 265, [1984] 2 All ER 111 at 128 per Peter Gibson J (revsd on other grounds [1986] Ch 423, [1985] 2 All ER 869, CA) (the principle is not applicable where it would involve contradicting the express terms of the condition precedent for the gift over); *Re Sinclair, Lloyds Bank plc v Imperial Cancer Research Fund* [1985] Ch 446 at 455, [1985] 1 All ER 1066 at 1072, CA; *Re Hunter's Executors, Petitioners* 1992 SLT 1141; *Re Jones, Jones v Midland Bank Trust Co Ltd* [1998] 1 FLR 246, CA. In none of these cases was the principle held applicable.

4 *Calthorpe v Gough* (1789) 3 Bro CC 395n; *Doo v Brabant* (1792) 3 Bro CC 393; *Humberstone v Stanton* (1813) 1 Ves & B 385; *Cox v Parker* (1856) 22 Beav 168; *Re Graham, Graham v Graham* [1929] 2 Ch 127 (cf *Re Bowen, Treasury Solicitor v Bowen* [1949] Ch 67 at 72, [1948] 2 All ER 979 at 982); *Re Bailey, Barrett v Hyder* [1951] Ch 407, [1951] 1 All ER 391, CA. In *Williams v Chitty, Chitty v Chitty* (1797) 3 Ves 545, the contrary contention was abandoned. The cases were explained in *Kellett v Kellett* (1871) IR 5 Eq 298 at 305. The same rule applies in a case where the prior donees are a class: *Brookman v Smith* (1872) LR 7 Exch 271, Ex Ch (approving *Tarback v Tarback* (1835) 4 LJ Ch 129). Cf, however, *Re May, Cockerton v Jones* [1944] Ch 1, [1943] 2 All ER 604 (where there was a gift over if no child attained 21; one child attained that age, but died between the date of the will and the date of a codicil which confirmed it; and it was held that the gift over took effect). It appears that the rule applies to a gift by way of substitution (see PARA 612 ante), where the events giving rise to

the substitutional gift do not happen: see *Hannam v Sims* (1858) 2 De G & J 151 at 154 per Turner LJ. The fact that the prior gift fails by reason of some rule of law may not, however, prevent the gift over from taking effect: *Hall v Warren* (1861) 9 HL Cas 420 (disapproving *A-G v Hodgson* (1846) 15 Sim 146; *Philpott v St George's Hospital* (1855) 21 Beav 134 (revsd on another point (1857) 6 HL Cas 338)). As to where the event giving rise to the gift over happens, and the prior donee dies during the testator's lifetime see PARA 695 ante.

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732. Examples of application of the rule.

If there is a conditional limitation over of an estate defeating a prior absolute interest, and the prior gift by any means whatever is taken out of the case, the subsequent limitation may take effect¹. Similarly, where there is a prior particular interest given, with remainder to a person unborn and on the death of the donee in remainder, or on his death under age a gift over, then, even if the unborn person never came into existence² and so could not fulfil the condition of dying or dying under age, it is inferred that the gift over is to take effect³ whenever it can do so in immediate succession to the prior limitation in the manner of a remainder⁴. Where a gift is made with an obligation imposed on the donee to do some act, with a gift over in default of performance, it is inferred that the gift over is also to take effect if the donee dies in the testator's lifetime without having performed the condition⁵ or fails to come into existence⁶.

Where the testator makes a gift to a woman for her life so long as she remains unmarried, and then directs that, in the event of her marrying, the property is to go over to another, without more, then the gift over takes effect on the determination of her estate, that is on her marriage, if she marries, and on her death, if she does not⁷. Conversely, where the first gift is during widowhood and the gift over is on death, the court infers that the gift over is to take effect also on remarriage⁸.

Similarly, where, after a gift to one person for his life or until some event such as bankruptcy, there is a gift over on some of such events, but the other events are ignored by the testator, the court infers that the gift over is also to take effect on death or on the other events, where the inference is consistent with the whole will⁹.

1 *Avelyn v Ward* (1750) 1 Ves Sen 420; *Re Sheppard's Trusts* (1855) 1 K & J 269 at 276; *Barnes v Jennings* (1866) LR 2 Eq 448 at 451; *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 40. See also *Re Green's Estate* (1860) 1 Drew & Sm 68; *Re Smith's Trusts* (1865) LR 1 Eq 79 at 83.

2 See *Foster v Cook* (1791) 3 Bro CC 347 (child still-born; gift over took effect).

3 *Jones v Westcomb* (1711) Prec Ch 316; *Re Fox's Estate, Dawes v Druitt* [1937] 4 All ER 664, CA (where the rule in *Jones v Westcomb* supra is stated); *Re Riggall, Wildash v Riggall* [1949] WN 491. See also *Andrews v Jones v Fulham* (1738) 2 Stra 1092; *Gulliver v Wickett* (1745) 1 Wils 105 (contrary to the opinion of the Court of Common Pleas on the same will in *Roe v Fulham v Wickett* (1741) Willes 303; as to these cases see *Frogmorton v Bramstone v Holyday* (1765) 3 Burr 1618 at 1624 per Lord Mansfield CJ; and note 4 infra); *Fonnereau v Fonnereau* (1745) 3 Atk 315; *Statham v Bell* (1774) 1 Cowp 40; *Underwood v Wing* (1855) 4 De GM & G 633 at 662. The rule applies also where the prior donees are a class: *Meadows v Parry* (1812) 1 Ves & B 124; *Murray v Jones, Fawcett v Jones* (1813) 2 Ves & B 313; *Mackinnon v Peach* (1833) 2 My & K 202; *Wilson v Mount* (1840) 2 Beav 397; *Evers v Challis* (1859) 7 HL Cas 531; *Lanphier v Buck* (1865) 2 Drew & Sm 484; *Beardsley v Beynon* (1865) 13 WR 831.

4 In *Evers v Challis* (1859) 7 HL Cas 531 at 549, 555, *Gulliver v Wickett* (1745) 1 Wils 105 is explained as based on the doctrines relating to contingent remainders; and the gift in *Evers v Challis* supra was held valid and able to take effect as a contingent remainder. The doctrine does not apply to a gift over by way of executory devise the contingencies in which cannot be split so as accurately to correspond with the events which have happened: *Hancock v Watson* [1902] AC 14, HL. However, it applies to limitations of personal estate

which may take effect immediately on the termination of prior limitations in the manner of a remainder: *Jones v Westcomb* (1711) Prec Ch 316.

5 *Avelyn v Ward* (1750) 1 Ves Sen 420; *Doe d Wells v Scott* (1814) 3 M & S 300; *Underwood v Wing* (1855) 4 De GM & G 633 at 662-663.

6 *Scatterwood v Edge* (1699) 1 Salk 229.

7 *Luxford v Cheeke* (1683) 3 Lev 125; *Jordan v Holkham* (1753) Amb 209; *Gordon v Adolphus* (1769) 3 Bro Parl Cas 306; *Meeds v Wood* (1854) 19 Beav 215; *Browne v Hammond* (1858) John 210; *Brown v Jarvis* (1860) 2 De GF & J 168; *Walpole v Laslett* (1862) 1 New Rep 180; *Eaton v Hewitt* (1862) 2 Drew & Sm 184; *Wardroper v Cutfield* (1864) 10 Jur NS 194; *Underhill v Roden* (1876) 2 ChD 494 at 497; *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA. See also *Re Cane, Ruff v Sivers* (1890) 63 LT 746; *O'Donoghue v O'Donoghue* [1906] 1 IR 482 (settlement); *Re Griffiths* [1917] P 59. In *Pile v Salter* (1832) 5 Sim 411, this doctrine was held not to extend to a gift over to the woman with other persons on her remarriage, so as to make it take effect on her death; but this case was said to be wrongly decided in *Underhill v Roden* supra, and was not followed in *Wardroper v Cutfield* supra and *Scarborough v Scarborough* (1888) 58 LT 851. In *Stewart v Murdoch* [1969] NI 78, it was pointed out that this line of authorities depends on the preceding interest being truly one for life, and not in the first instance absolute, when the gift over will take effect only on the happening of the specified contingency. Cf para 659 ante.

8 *Bainbridge v Cream* (1852) 16 Beav 25; *Stanford v Stanford* (1886) 34 ChD 362; *Re Dear, Helby v Dear* (1889) 58 LJ Ch 659; *Stanier v Hodgkinson* (1903) 73 LJ Ch 179 at 183n; *Re Warner, Watts v Silvey* [1918] 1 Ch 368. See also *Re Carleton* (1909) 28 NZLR 1066. As to the ascertainment of a class on such events cf para 597 ante. The contrary has been decided as to a settlement inter vivos: see *Re Wyatt, Gowan v Wyatt* (1889) 60 LT 920. Where in relation to a gift the express mention of only one of two relevant events is due to carelessness, a corresponding gift in the other event may be implied to give effect to the testator's intention: *Re Main, Official Solicitor v Main* [1947] 1 All ER 255.

9 *Etches v Etches* (1856) 3 Drew 441 (gift until bankruptcy; gift over on death implied); *Re Seaton, Ellis v Seaton* [1913] 2 Ch 614 (gift until she should receive a legacy). Cf *Re Akeroyd's Settlement, Roberts v Akeroyd* [1893] 3 Ch 363, CA (gift over on bankruptcy implied), distinguishing *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640, CA. The distinction in all these cases is between a limitation for a definite period with a gift over on some of the events defining that period, when the rules stated in the text may apply, and a limitation followed by an executory gift over on any collateral contingency, which is to determine the first estate sooner than it would otherwise be determined: see *Sheffield v Lord Orrery* (1745) 3 Atk 282 at 285; *Walpole v Laslett* (1862) 1 New Rep 180.

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733. Inferences from gifts over or other clauses.

A gift over or other clause may be an indication of intention more or less valuable according to the context and the circumstances¹. Ambiguous words in an original gift may be explained by unambiguous words in a gift over² or other subsequent clause³; but where the words in an original gift are plain and unambiguous taken by themselves, a gift over confined to one particular event does not compel the court to place a forced construction on the original gift⁴.

A gift to a donee at a specified age, followed by a gift over on his death before that age without leaving issue, confers a vested interest subject to an executory gift over, for the gift over is not to take effect on death under the specified age if issue is left⁵.

1 *Boughton v James* (1844) 1 Coll 26 at 44 per Knight Bruce V-C.

2 *Ralph v Carrick* (1879) 11 ChD 873 at 884, CA. See also *Judd v Judd* (1830) 3 Sim 525 (reconsidered in *Hunter v Judd* (1833) 4 Sim 455); *Re Swain, Brett v Ward* [1918] 1 Ch 399 (settled on appeal [1918] 1 Ch 574, CA); *Re Rawson, Rigby v Rawson* (1920) 124 LT 498.

3 Eg an advancement clause or hotchpot clause, as in *Vivian v Mills* (1839) 1 Beav 315; *Harrison v Grimwood* (1849), as reported in 12 Beav 192 at 199; *Walker v Simpson* (1855) 1 K & J 713 at 720. See also *Re Jacob's Will* (1861) 7 Jur NS 302; *Re Turney, Turney v Turney* [1899] 2 Ch 739 at 746, 748 (where there was provision for interest on the 'respective portions' of children until they attained 25, and a gift over of the 'share' of a child not attaining 25 to a stranger).

4 *Re Rawlinson, Hill v Withall* [1909] 2 Ch 36 at 39. See also *Walker v Mower* (1852) 16 Beav 365.

5 *Bland v Williams* (1834) 3 My & K 411 at 417 per Leach MR. As to failure to attain a specified age generally see PARA 722 ante.

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734. Exclusion of persons entitled on intestacy.

Where a will shows an intention that persons claiming under the testator as on intestacy are not to take in any event but the testator has expressly provided for other persons to take in certain contingencies, the restriction as to such contingencies may sometimes be disregarded and the gift in the will may take effect in all events¹. However, except in such cases, the title of the persons claiming on a failure of the gift or for want of disposition by the testator is not excluded merely by reason that he has not contemplated all contingencies; such persons take on every event for which the testator has not provided².

1 See *Bradford v Foley* (1779) 1 Doug KB 63; *Harman v Dickenson* (1781) 1 Bro CC 91; *Horton v Whittaker* (1786) 1 Term Rep 346; and the cases cited in PARA 548 note 8 ante.

2 *Lord Amherst v Lytton* (1729) 5 Bro Parl Cas 254; *Sheffield v Lord Orrery* (1745) 3 Atk 282 at 285-286; *Doe d Vessey v Wilkinson* (1788) 2 Term Rep 209 at 218; *Shulldham v Smith* (1818) 6 Dow 22, HL; *Dicken v Clarke* (1837) 2 Y & C Ex 572.

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(v) Particular Conditions

A. GIFTS OVER IN THE EVENT OF DEATH

735. The general rule.

A gift over of property given to a person absolutely in the event of his death is construed as a gift over in the event of his death before the period of distribution¹ or vesting unless some other period is indicated by the context². The rule is based on the ground that, as death is inevitable, it cannot be deemed a contingency; the testator could not have intended merely to provide for the possibility of the donee dying. It is also based on the presumption in favour of vesting³.

If, therefore, the gift is immediate and there is a gift over in the event of the donee's death, without any suggestion of succession, *prima facie* the gift over takes effect only where the donee dies in the testator's lifetime, as an alternative gift⁴, and, if the gift is postponed to a life

interest, prima facie the gift over takes effect only on death before the life tenant, as an alternative gift⁵. Alternatively, if the context so requires, the gift over may be construed as referring to death before vesting⁶.

In some cases, however, the context of the will shows that the first donee takes not an absolute interest but a life interest only, or that the gift in case of death is to take effect not as a contingent gift but by way of succession in any event; the second donee then takes on the death of the first donee at any time⁷. A gift to one person in the event of the death of another is treated as a gift in remainder or succession only where the interest of the first taker is a mere life interest⁸. Where an indefinite gift to one person is followed by a gift over 'at' or 'after' his death, then prima facie the gift over takes effect, if at all, by way of succession not contingency⁹. In such a case it depends on the construction of the will as a whole whether the prior gift is to be treated as absolute and the gift over as void, or whether the prior gift is reduced to a life interest¹⁰.

Death is regarded as a contingent event only from necessity and where the words import no other contingency¹¹.

1 For the meaning of 'period of distribution' see PARA 597 note 1 ante.

2 *Penny v Railways Comr* [1900] AC 628 at 634, PC. See also *Hodgson v Smithson* (1856) 8 De GM & G 604; *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 395 per Lord Cairns LC.

3 *Home v Pillans* (1833) 2 My & K 15 at 20-21. As to the presumption as to vesting see PARAS 696-698 ante.

4 *Lord Bindon v Earl of Suffolk* (1707) 1 P Wms 96 at 97; *Hinckley v Simmons* (1798) 4 Ves 160; *King v Taylor* (1801) 5 Ves 806; *Turner v Moor* (1801) 6 Ves 557; *Cambridge v Rous* (1802) 8 Ves 12 at 20; *Webster v Hale* (1803) 8 Ves 410; *Ommaney v Bevan* (1811) 18 Ves 291; *Slade v Milner* (1819) 4 Madd 144; *Crigan v Baines* (1834) 7 Sim 40; *Clarke v Lubbock* (1842) 1 Y & C Ch Cas 492; *Howard v Howard* (1856) 21 Beav 550; *Taylor v Stainton* (1856) 2 Jur NS 634; *Schenk v Agnew* (1858) 4 K & J 405; *Re Neary's Estate* (1881) 7 LR Ir 311; *Elliott v Smith* (1882) 22 ChD 236; *Re Valdez's Trusts* (1888) 40 ChD 159 at 162; *Re Reeves, Edwards v Reeves-Hughes* (1907) 51 Sol Jo 325; *Re Fisher, Robinson v Eardley* [1915] 1 Ch 302 (following *Howard v Howard* supra). As to alternative gifts see PARA 611 et seq ante.

5 *Hervey v M'Laughlin* (1815) 1 Price 264; *Edwards v Edwards* (1852) 15 Beav 357 at 363-364 (the third rule there stated is not affected on this point by *O'Mahoney v Burdett* (1874) LR 7 HL 388: see PARA 736 note 6 post); *Green v Barrow* (1853) 10 Hare 459 at 461; *Bolitho v Hillyar* (1865) 11 Jur NS 556. See also *Galland v Leonard* (1818) 1 Swan 161; *Le Jeune v Le Jeune* (1837) 2 Keen 701.

6 *Penny v Railways Comr* [1900] AC 628, PC; *Re Kerr's Estate* [1913] 1 IR 214.

7 *Billings v Sandom* (1784) 1 Bro CC 393; *Nowland v Nelligan* (1785) 1 Bro CC 489; *Lord Douglas v Chalmer* (1795) 2 Ves 501; *Smart v Clark* (1827) 3 Russ 365; *Tilson v Jones, Tilson v Thornton* (1830) 1 Russ & M 553; *Jones v Morris* (1922) 91 LJ Ch 495. Cf *Wilkins v Jodrell* (1879) 13 ChD 564 at 569; *Watson v Watson* (1881) 7 PD 10. As to the weight to be given to various circumstances see *Taylor v Stainton* (1856) 2 Jur NS 634.

8 *Penny v Railways Comr* [1900] AC 628 at 634, PC.

9 *Re Adam's Trusts* (1865) 13 LT 347.

10 *Lloyd v Tweedy* [1898] 1 IR 5 at 17. See also *Lady Monck's Will, Monck v Croker* [1900] 1 IR 56 at 66, Ir CA; and PARAS 665-666 ante. If the later gift contains no reference to death but is introduced merely by words such as 'thereafter', the prior gift is not reduced: *Re Gouk, Allen v Allen* [1957] 1 All ER 469, [1957] 1 WLR 493.

11 *Gawler v Cadby* (1821) Jac 346 at 348; *Woodroffe v Woodroffe* [1894] 1 IR 299 at 302. As to gifts on death coupled with a contingency see PARA 736 post.

736. Gift over on death with contingency.

Where a gift over is on death coupled with some contingency, such as on the death of the donee without leaving issue or without leaving issue living at the time of his death, then prima facie the gift over takes effect on the donee's death at any time¹, and not merely on his death before the date of distribution², if the rest of the contingency is fulfilled at his death³. It is immaterial that the donees under the gift over are the children of the first taker⁴, and the rule is the same for real and personal estate⁵ and whether there is a previous life interest⁶ or not⁷.

However, in the context of the will, the contingency may be confined to a death during the lifetime of a life tenant⁸ or during the testator's lifetime⁹ or before distribution or some other event¹⁰. Thus where on a particular event the fund is directed to be divided or the donee's receipt is directed to be a good discharge, the death without issue is confined to the period prior to division or payment, as otherwise the direction could not be carried out¹¹.

It may sometimes appear that the gift over is not an executory limitation defeating the prior gift at any time but a substitutional gift, and the death with a contingency is confined to the period within which substitution takes place¹²; or there may be alternative gifts over, whether the death takes place with or without a failure of issue or other contingent event¹³.

1 As to contingencies happening in the testator's lifetime see PARA 695 ante.

2 For the meaning of 'date of distribution' see PARA 597 note 1 ante.

3 *Ingram v Soutten* (1874) LR 7 HL 408 (dying without issue living at her death); *O'Mahoney v Burdett* (1874) LR 7 HL 388 (dying unmarried or without children); *Woodroffe v Woodroffe* [1894] 1 IR 299 at 302 (dying without issue surviving him); *Re Richardson's Trusts* [1896] 1 IR 295, Ir CA (dying leaving children fatherless); *Re Schnadhorst, Sandkuhl v Schnadhorst* [1902] 2 Ch 234, CA (dying leaving issue); *Duffill v Duffill* [1903] AC 491, PC (dying before his brother); *Re Williams' Will Trusts, Rees v Williams* [1949] 2 All ER 11 (dying without issue surviving her); *Re McGrane, McGrane v McGrane* (1964) 98 ILTR 95 (dying before his brother). See also *Smith v Stewart* (1851) 15 Jur 834; *Smith v Spencer* (1856) 6 De GM & G 631 (where the original donee took at 21 but the gift over was not restricted to a death under that age); *Drake v Collins* (1869) 20 LT 970; *Re Parry and Daggs* (1885) 31 ChD 130, CA.

4 *Home v Pillans* (1833) 2 My & K 15 at 22; *Re Schnadhorst, Sandkuhl v Schnadhorst* [1901] 2 Ch 338 at 343 (affd [1902] 2 Ch 234, CA).

5 *Slaney v Slaney* (1864) 33 Beav 631.

6 The fourth rule in *Edwards v Edwards* (1852) 15 Beav 357 at 364 et seq, enunciated by Romilly MR, to the effect that, where such a gift is postponed, prima facie the gift over refers to a death without issue before the period of distribution, was disapproved in *O'Mahoney v Burdett* (1874) LR 7 HL 388, and was not applied in *Re Schnadhorst, Sandkuhl v Schnadhorst* [1902] 2 Ch 234, CA, or *Re Williams' Will Trusts, Rees v Williams* [1949] 2 All ER 11. The following cases, where the fourth rule in *Edwards v Edwards* supra was followed, may perhaps be supported on the contexts of the wills in question: *Barker v Cocks* (1843) 6 Beav 82; *Beckton v Barton* (1859) 27 Beav 99; *Slaney v Slaney* (1864) 33 Beav 631; *Wood v Wood* (1866) 35 Beav 587.

7 *Child v Giblett* (1834) 3 My & K 71; *Smith v Stewart* (1851) 4 De G & Sm 253; *Edwards v Edwards* (1852) 15 Beav 357 at 363; *Cotton v Cotton* (1854) 23 LJ Ch 489; *Randfield v Randfield* (1860) 8 HL Cas 225; *Bowers v Bowers* (1870) 5 Ch App 244.

8 *Besant v Cox* (1877) 6 ChD 604 (gift over to survivors of a class leaving issue) (following *Olivant v Wright* (1875) 1 ChD 346, CA, and distinguishing *O'Mahoney v Burdett* (1874) LR 7 HL 388); *McCormick v Simpson* [1907] AC 494, PC; *Re Mitchell, Mitchell v Mitchell* (1913) 108 LT 180; *Re Roberts, Roberts v Morgan* [1916] 2 Ch 42; *Christian v Taylor* [1926] AC 773, PC. However, *Besant v Cox* supra and *Re Smaling, Johnson v Smaling* (1877) 26 WR 231 are of doubtful authority, having regard to the rule previously laid down in *O'Mahoney v Burdett* supra: see *Woodroffe v Woodroffe* [1894] 1 IR 299 at 302.

9 *Re Luddy, Peard v Morton* (1883) 25 ChD 394.

10 *Brotherton v Bury* (1853) 18 Beav 65 (before attaining 21); *Clark v Henry* (1871) 6 Ch App 588; *Hordern v Hordern* [1909] AC 210 at 216, PC.

11 *Galland v Leonard* (1818) 1 Swan 161; *Barker v Cocks* (1843) 6 Beav 82; *Wheable v Whithers* (1849) 16 Sim 505; *Johnston v Antrabus* (1856) 21 Beav 556; *Re Anstice* (1856) 23 Beav 135; *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 403, 406; *Lewin v Killey* (1888) 13 App Cas 783, PC; *Re Mackinlay, Scrimgeour v Mackinlay* (1911) 56 Sol Jo 142; *Re Mitchell, Mitchell v Mitchell* (1913) 108 LT 180.

12 *Re Hayward, Creery v Lingwood* (1882) 19 ChD 470. As to substitutional gifts see PARA 612 ante.

13 *Clayton v Lowe* (1822) 5 B & Ald 636 (gifts over both on death without children and on death leaving children); *Gee v Manchester Corpn* (1852) 17 QB 737 at 745. The ratio decidendi of these cases, that the addition of all the contingencies amounted to certainty, was dissented from in *Gosling v Townshend* (1853) 2 WR 23; *Cooper v Cooper* (1855) 1 K & J 658 at 662; *Bowers v Bowers* (1870) 5 Ch App 244 at 248. However, it appears to have been approved in *O'Mahoney v Burdett* (1874) LR 7 HL 388 at 397 per Lord Cairns LC (explaining *Da Costa v Keir* (1827) 3 Russ 360 as decided on this and other grounds). See also *Galland v Leonard* (1818) 1 Swan 161; *Woodburne v Woodburne* (1853) 23 LJ Ch 336; *Re Brailsford, Holmes v Crompton and Evans' Union Bank* [1916] 2 Ch 536 (following *Gee v Manchester Corpn* (1852) 17 QB 737); *Re Colles' Estate* [1918] 1 IR 1 (settlement).

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737. Gift over on death before actual receipts.

As a rule, a gift over may be made on the donee dying before he actually receives his legacy or on his becoming disentitled to receive it before actual payment. If expressed with sufficient certainty, such a gift is valid¹, as also is any gift where the gift over is of the part of the property which has not been received². A gift over on death during the continuance of the trusts of the will may be valid, at least in the case of a specific gift³.

Such a gift over in the case of a residuary gift, and applying to the whole fund, referring to the time when the fund is 'receivable' or 'de jure receivable' may be void for uncertainty⁴. There is no objection to postponing the vesting of a residuary gift until actual receipt⁵, and there appears to be no sufficient reason for a different rule in postponing the divesting where the intention is clearly shown⁶.

The court inclines to construe such gifts over so that the period during which the operation of the gift over is to extend may not continue beyond the time at which the legacy is by law receivable⁷, that is, in general, where the gift is not otherwise postponed, at a year from the testator's death⁸, and in other cases at the death of the life tenant or other period of distribution⁹. This construction cannot be adopted, however, where the language of the will is precise and refers to actual receipt¹⁰.

1 *Johnson v Crook* (1879) 12 ChD 639 (approved in *Re Chaston, Chaston v Seago* (1881) 18 ChD 218); *Re Wilkins, Spencer v Duckworth* (1881) 18 ChD 634; *Re Goulder, Goulder v Goulder* [1905] 2 Ch 100 (not following *Martin v Martin* (1866) LR 2 Eq 404; dicta in *Minors v Battison* (1876) 1 App Cas 428 at 437, 443, 446, HL; and *Bubb v Padwick* (1880) 13 ChD 517). These cases were considered in *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355 at 365-366, [1961] 3 All ER 1067 at 1071, CA. See also *Faulkner v Hollingsworth* (1784), cited in 8 Ves at 558 (where there was a gift over if the legatee died before certain real estate was sold and the money was received; explained as involving an inquiry on an ascertainable matter in *Re Chaston, Chaston v Seago* supra).

2 *Re Chaston, Chaston v Seago* (1881) 18 ChD 218; *Re Goulder, Goulder v Goulder* [1905] 2 Ch 100 (explained in *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA).

3 *Re Teale, Teale v Teale* (1885) 53 LT 936.

4 *Hutcheon v Mannington* (1791) 1 Ves 366 (as explained by Jessel MR in *Johnson v Crook* (1879) 12 ChD 639) (where on the construction adopted the gift over was on death before the gift was receivable); *Martin v*

Martin (1866) LR 2 Eq 404; *Minors v Battison* (1876) 1 App Cas 428, HL; *Bubb v Padwick* (1880) 13 ChD 517; *Roberts v Youle* (1880) 49 LJ Ch 744 at 745; *Re Hudson* [1912] VLR 140.

5 *Gaskell v Harman* (1801) 6 Ves 159; on appeal (1805) 11 Ves 489 at 497 per Lord Eldon LC (explaining *Hutcheon v Mannington* (1791) 1 Ves 366).

6 Notwithstanding the inconvenience, effect may be given to such an intention: see PARA 534 ante; cf *Ditmas v Robertson* (1840) 4 Jur 957 (where arrival in England was held to be certain).

7 *Re Sampson, Sampson v Sampson* [1896] 1 Ch 630 at 635-636. See also *Whiting v Force* (1840) 2 Beav 571 (where 'receiving' was construed with its correlative 'pay' in the original gift); *Rammell v Gillow* (1845) 15 LJ Ch 35 at 39; and the cases in notes 8-9 infra. In particular cases an inquiry may be directed as to when the property could have been got in (*Law v Thompson* (1827) 4 Russ 92; *Re Arrowsmith's Trust* (1860) 29 LJ Ch 774), although in *Hutcheon v Mannington* (1791) 1 Ves 366 at 367, Lord Thurlow considered such an inquiry impracticable and the gift over void for uncertainty.

8 *Re Arrowsmith's Trust* (1860) 2 De GF & J 474; *Re Collison, Collison v Barber* (1879) 12 ChD 834; *Re Wilkins, Spencer v Duckworth* (1881) 18 ChD 634 (residue; gift over before final division of testator's estate); *Barnes v Whittaker* (1893) 14 NSW Eq 148; *Hunt v Hunt* (1902) 2 SRNSW Eq 72; *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA. See also *Re Jones, Midland Bank Executor and Trustee Co Ltd v League of Welldoers* [1950] 2 All ER 239 (explained in *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* supra); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1019, 1022.

9 *Re Dodgson's Trusts* (1853) 1 Drew 440; *Minors v Battison* (1876) 1 App Cas 428, HL; *Re Chaston, Chaston v Seago* (1881) 18 ChD 218; *Wilks v Bannister* (1885) 30 ChD 512. Cf *Re Byrne's Will Trusts, Dowling v Lawler* [1967] IR 304 (death before 'residue of my estate has been ascertained and disposed of'; no longer applicable after change of character from executrix to trustee).

10 *Johnson v Crook* (1879) 12 ChD 639; *Re Goulder, Goulder v Goulder* [1905] 2 Ch 100; *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA.

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738. Gift over on death before legacy is due.

A gift over on the death of a donee before the gift becomes due or payable is valid and may take effect on the death of the donee in the testator's lifetime¹. The time at which the gift becomes due or payable for the purposes of the gift over depends on the date of distribution contemplated by the will², but is susceptible of a variety of interpretations according to the context³. In a gift to children, where the time for payment is after a life interest on their attaining a certain age or other qualification, for example in the case of sons at the age of 21 and in the case of daughters at 21 or marriage, the gift is not read as making the provision for a child contingent on surviving both or either of its parents unless the intention is clearly so expressed⁴. In such a case a gift over on death before the gift becomes payable is confined to a death before attaining the age of 21 or other qualification, 'payable' being construed to mean 'vested'; and accordingly the share of a child who attains 21 and dies in the lifetime of his parent is not divested⁵.

1 *Willing v Baine* (1731) 3 P Wms 113; *Humberstone v Stanton* (1813) 1 Ves & B 385; *Walker v Main* (1819) 1 Jac & W 1; *Humphreys v Howes* (1830) 1 Russ & M 639. See also *Miller v Warren* (1690) 2 Vern 207; *Darrel v Molesworth* (1700) 2 Vern 378 (accepted as an authority on this point in *Ive v King* (1852) 16 Beav 46 at 54). See, however, the notes to *Miller v Warren* supra and *Darrel v Molesworth* supra in the reports cited.

2 Eg the death of the life tenant, where the legacy is given after a life interest: *Crowder v Stone* (1829) 3 Russ 217 at 222; *Creswick v Gaskell* (1853) 16 Beav 577. In the case of immediate legacies, the death of the testator was considered to be denoted in *Collins v Macpherson* (1827) 2 Sim 87; *Cort v Winder* (1844) 1 Coll

320; *Whitman v Aitken* (1866) LR 2 Eq 414 at 417. The expiration of a year from the testator's death may be adopted in particular cases where the context does not otherwise provide: cf the cases cited in PARA 737 note 8 ante.

3 *Cort v Winder* (1844) 1 Coll 320 at 322 per Knight Bruce V-C.

4 As to presumptions in favour of children see PARA 551 ante.

5 *Emperor v Rolfe* (1748-9) 1 Ves Sen 208; *Cholmondeley v Meyrick* (1758) 1 Eden 77; *Earl of Salisbury v Lambe* (1759) 1 Eden 465; *Willis v Willis* (1796) 3 Ves 51; *Hope v Lord Clifden* (1801) 6 Ves 499; *Schenck v Legh* (1803) 9 Ves 300; *Powis v Burdett* (1804) 9 Ves 428 (in spite of expressions referring to 'leaving' children); *Hallifax v Wilson* (1809) 16 Ves 168; *Walker v Main* (1819) 1 Jac & W 1 (death before legacy 'due and payable'); *Hayward v James* (1860) 28 Beav 523; *Haydon v Rose* (1870) LR 10 Eq 224; *Partridge v Baylis* (1881) 17 ChD 835; *Wakefield v Maffet* (1885) 10 App Cas 422 at 433, 435, HL. Cf, however, *Re Williams* (1849) 12 Beav 317. The doctrine of these cases should not be extended: *Rammell v Gillow* (1845) 15 LJ Ch 35 at 38 per Wigram V-C (following *Whatford v Moore* (1837) 3 My & Cr 270 at 289).

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739. Gift over on death before becoming entitled.

In a gift over on the death of the donee before becoming entitled, 'entitled' has no definite legal meaning and may mean either entitled in interest¹ or entitled in possession², according to the context. A gift over on death before being 'entitled in possession' is, in a context requiring it, capable of being construed as 'entitled in interest'³.

A gift over on the donee's death before attaining a vested interest *prima facie* refers to death before vesting in the technical sense⁴. If, however, the context so requires, it may refer to death before taking possession⁵ or before having the right to possession⁶.

1 *Re Crosland, Craig v Midgley* (1886) 54 LT 238; *Re MacAndrew's Will Trusts, Stephens v Barclays Bank Ltd* [1964] Ch 704, [1963] 2 All ER 919. See also PARA 485 note 4 ante.

2 *Re Maunder, Maunder v Maunder* [1902] 2 Ch 875 (affd [1903] 1 Ch 451, CA), following *Turner v Gosset* (1865) 34 Beav 593 at 594. See also *Jopp v Wood* (1865) 2 De GJ & Sm 323 (settlement; prior donee unborn and entitled at birth); *Re Noyce, Brown v Rigg* (1885) 31 ChD 75; *Re Whiter, Windsor v Jones* (1911) 105 LT 749.

3 *Re Yates' Trusts* (1851) 16 Jur 78.

4 *Parkin v Hodgkinson* (1846) 15 Sim 293; *Bull v Jones* (1862) 31 LJ Ch 858 at 861; *Richardson v Power* (1865) 19 CBNS 780 at 802, Ex Ch (remainder in fee simple). See also *Re Arnold's Estate* (1863) 33 Beav 163 at 173 (on the same will). The gift over took effect on a class of prior donees failing to come into existence in *Beardsley v Beynon* (1865) 12 LT 698.

5 *King v Cullen* (1848) 2 De G & Sm 252 at 254 (where the will showed that a death after vesting, in the technical sense, was within the testator's meaning); *Re Morris* (1857) 26 LJ Ch 688; *Young v Robertson* (1862) 4 Macq 314, HL (gift over to survivors).

6 *Sillick v Booth* (1841) 1 Y & C Ch Cas 117 at 121, 124.

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B. LIMITATIONS ON FAILURE OF ISSUE

740. The statutory rule.

In a gift by will¹, the words 'die without issue', or 'die without leaving issue', or 'have no issue', or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, are construed to mean a want or failure of issue in the lifetime or at the time of the death of that person, and not an indefinite failure of issue, unless a contrary intention appears by the will².

This rule has been applied to gifts on death 'without leaving male issue'³ but not to like gifts in terms of 'heirs of the body' or 'heirs' even though coupled with words of procreation⁴. It has been doubted whether the rule applies to words such as 'in default of issue' or 'on failure of issue' of a named person not containing, in themselves or by inference from the context, any reference to the death of that person⁵; but the fact that the rule contemplates words which may import a failure of issue in the lifetime of the named person appears to be inconsistent with the doubt. The rule has been held not to apply where the words referring to dying without issue are combined with other words, such as 'dying under 21'⁶, and it has been questioned whether it applies to any but an entire failure of issue⁷.

1 This rule applies only to gifts in a will made after 31 December 1837: see the Wills Act 1837 s 34. Restrictions were placed on the creation of executory interests to take effect on failure of issue by the Law of Property Act 1925 s 134 (as amended): see REAL PROPERTY vol 39(2) (Reissue) PARA 178.

2 Wills Act 1837 s 29. See *O'Neill v Montgomery* (1861) 12 I Ch R 163; *Re Mid-Kent Railway Act 1856, ex p Bate* (1863) 11 WR 417; *Dowling v Dowling* (1866) 1 Ch App 612 at 616; *Gwynne v Berry* (1875) IR 9 CL 494; *Re Chinnery's Estate* (1877) 1 LR Ir 296; *Re Davey, Prisk v Mitchell* [1915] 1 Ch 837, CA (where it was held on the facts that 'dying without leaving lawful issue' must be ascertained within a life in being at the testator's death).

3 *Re Edwards, Edwards v Edwards* [1894] 3 Ch 644 (following *Upton v Hardman* (1874) IR 9 Eq 157). Cf *Neville v Thacker* (1888) 23 LR Ir 344.

4 *Harris v Davis* (1844) 1 Coll 416 at 424 (in case of there being no heir); *Re Sallery* (1861) 11 I Ch R 236 ('without heirs or issue'); *Dawson v Small* (1874) 9 Ch App 651 ('without heirs male of his body lawfully begot'); *Re Brown and Campbell* (1898) 29 OR 402 ('without lawful heirs by him begotten'); *Re Ross* (1901) 1 SRNSW 1 ('without lawful heirs'); *Re Leach, Leach v Leach* [1912] 2 Ch 422 at 428 ('without leaving a male heir'); *Re Conboy's Estate* [1916] 1 IR 51 ('heir or issue'). Cf *Dodds v Dodds* (1860) 10 I Ch R 476 ('without lawful male heir').

5 Hawkins on Wills (1st Edn) 177, (3rd Edn) 213; *Shand v Robinson* (1898) 19 NSW Eq 85 at 88. However, for the contrary view see *Neville v Thacker* (1888) 23 LR Ir 344 at 357; *Green v Green* (1849) 3 De G & Sm 480 (where the contrary appears to have been assumed).

6 *Morris v Morris* (1853) 17 Beav 198 at 202.

7 *Re Thomas, Thomas v Thomas* [1921] 1 Ch 306.

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741. Contrary intention.

A contrary intention excluding the statutory rule¹ may be shown by the fact that the person whose failure of issue is contemplated has a prior entailed interest, or that a preceding gift is, without any implication arising from the words in question², a limitation of an entailed interest to that person or issue³, or otherwise, generally, by the context of the will⁴.

1 As to the statutory rule see PARA 740 ante.

2 *Re O'Bierne* (1844) 1 Jo & Lat 352.

3 See the Wills Act 1837 s 29. As to possible constructions of s 29, as applied to real and personal estate respectively see *Greenway v Greenway* (1860) 2 De GF & J 128 at 136-137 per Lord Campbell LC. For an example of such a contrary intention see *Fay v Fay* (1880) 5 LR Ir 274. See also *Re Clerke, Clowes v Clerke* [1915] 2 Ch 301. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997 (see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119), but between 1 January 1926 and 31 December 1996 inclusive could have been created by will (although only by words which would have that effect in a deed (see PARAS 671 ante, 760 post)).

4 *Green v Green* (1849) 3 De G & Sm 480; *Green v Giles* (1855) 5 I Ch R 25; *Neville v Thacker* (1888) 23 LR Ir 344; *Weldon v Weldon* [1911] 1 IR 177, Ir CA (followed in *Cowan v Ball* [1933] NI 173). See also *Re Thomas, Thomas v Thomas* [1921] 1 Ch 306.

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742. Reference to issue taking under prior gifts.

The statutory rule¹ does not apply where the words of limitation refer to the contingency that no issue described in a preceding gift should be born or that there should be no issue who should live to attain the age or otherwise answer the description required for obtaining a vested interest by a preceding gift to such issue².

Where, after gifts to particular descriptions of issue, the gift over is 'in default of such issue', the word 'such' cannot, as a general rule, be rejected, and the statutory rule is excluded³. Where, however, the particular descriptions of issue are to take in tail, especially if their interests are shown to be interests in tail to each of them successively, 'such issue' may be construed as 'their issue', so that the subsequent limitations take effect as remainders⁴. In other cases, on the will taken as a whole the word 'such' was rejected in order to give the first son an entailed interest⁵. Words referring to failure of issue of a person in a gift over following a devise to the children of that person, or other special class of his issue, not being a contingent class, either in fee simple or in fee tail, prima facie mean in default of such children or other special class of issue, and the gift takes effect only on failure of the previous gifts⁶. A similar rule operates in cases of bequests of personalty or of a mixed fund where the prior bequest is an absolute bequest to children or other special class of issue, not being a contingent class⁷.

The statutory rule is also excluded if the failure of issue, expressly or by inference from the will taken as a whole, is ascertained at a specified death⁸ or is indefinite⁹.

1 As to the statutory rule see PARA 740 ante.

2 Wills Act 1837 s 29 proviso. See also *Re Bence, Smith v Bence* [1891] 3 Ch 242 at 249, CA.

3 *Staines v Maddock* (1728) 3 Bro Parl Cas 108; *Denne d Briddon v Page* (1783) 11 East 603n; *Hay v Earl of Coventry* (1789) 3 Term Rep 83; *Doe d Comberbach v Perryn* (1789) 3 Term Rep 484; *Goodtitle d Sweet v Herring* (1801) 1 East 264; *R v Marquis of Stafford* (1806) 7 East 521; *Foster v Earl of Romney* (1809) 11 East 594; *Ryan v Cowley* (1835) L & G temp Sugd 7; *Boydell v Golightly, Boydell v Stanton, Boydell v Morland* (1844) 14 Sim 327 at 344; *Ashburner v Wilson* (1850) 17 Sim 204; *Bridger v Ramsay* (1853) 10 Hare 320.

4 *Lewis d Ormond v Waters* (1805) 6 East 336; *Biddulph v Lees* (1858) EB & E 289, Ex Ch.

5 *Evans d Brooke v Astley* (1764) 3 Burr 1570; *Parker v Tootal* (1865) 11 HL Cas 143. See also PARA 760 post. The same construction may be adopted where the gift over is in default of issue 'as aforesaid': *Malcolm v Taylor*

(1831) 2 Russ & M 416; *Walker v Petchell* (1845) 1 CB 652. For cases of implied reference to previous gifts see PARA 743 post. Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

6 *Bamfield v Popham* (1703) 1 P Wms 54 (see the comments on this case at 1 P Wms 760); *Blackborn v Edgley* (1719) 1 P Wms 600; *Goodright v Dunham* (1779) 1 Doug KB 264; *Baker v Tucker* (1850) 3 HL Cas 106; *Cormack v Copous* (1853) 17 Beav 397 at 402; *Foster v Hayes* (1855) 4 E & B 717 at 734, Ex Ch; *Towns v Wentworth* (1858) 11 Moo PCC 526 at 547; *Smyth v Power* (1876) IR 10 Eq 192 at 199.

7 *Salkeld v Vernon*, *Salkeld v Salkeld* (1758) 1 Eden 64; *Vandergucht v Blake* (1795) 2 Ves 534; *Ellicombe v Gompertz* (1837) 3 My & Cr 127; *Robinson v Hunt* (1841) 4 Beav 450; *Leeming v Sherratt* (1842) 2 Hare 14 at 17; *Pride v Fooks* (1858) 3 De G & J 252 at 280 per Turner LJ; *Re Wyndham's Trusts* (1865) LR 1 Eq 290; *Re Sanders' Trusts* (1866) LR 1 Eq 675; *Re Mercer's Trusts*, *Davies v Mercer* (1876) 4 ChD 182; *Re Carr* (1902) 2 SRNSW 1.

8 *Westwood v Southey* (1852) 2 Sim NS 192 at 203; *Re Edwards, Jones v Jones* [1906] 1 Ch 570, CA (disapproving *Kidman v Kidman* (1871) 40 LJ Ch 359 at 360).

9 *Bowen v Lewis* (1884) 9 App Cas 890.

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743. Where the prior gift is contingent.

It is more difficult, although not impossible¹, to apply a reference to 'issue' to those taking under the prior gifts where the prior limitation is on contingent events², or is to a contingent class, such as sons attaining 21 or surviving a life tenant, so that there may be issue who may not take under it³, or where the prior limitation is to a definite number of the children⁴, or if the issue taking under previous gifts take for life only⁵. The fact that the issue take merely as objects of a power of appointment does not, however, prevent the construction of a reference to 'issue' from being construed as a reference to such issue, objects of the power, as are living at the death of the appointor⁶.

1 *Bryan v Mansion* (1852) 5 De G & Sm 737 at 742 (where, however, in the context, 'issue' meant 'children'); *Sanders v Ashford* (1860) 28 Beav 609 (where the gift over was in default of issue attaining 21); *Re Mercer's Trusts*, *Davies v Mercer* (1876) 4 ChD 182 (where there was a gift to children living at the parent's death and a gift over if the parent were to 'die without issue'); *Hutchinson v Tottenham* [1898] 1 IR 403 (affd [1899] 1 IR 344, Ir CA) (children born in testatrix's lifetime).

2 *Andree v Ward* (1826) 1 Russ 260 (if ancestor married a woman of specified fortune); *Campbell v Harding* (1831) 2 Russ & M 390 (if ancestor married) (affd sub nom *Candy v Campbell* (1834) 2 Cl & Fin 421, HL); *Franks v Price* (1838) 5 Bing NC 37; *Franks v Price* (1840) 3 Beav 182.

3 *Doe d Rew v Lucraft* (1832) 1 Moo & S 573 (prior issue taking at 21); *Pride v Fooks* (1858) 3 De G & J 252 at 280-281 per Turner LJ.

4 *Langley v Baldwin* (1707) 1 Eq Cas Abr 185 pl 29 (first six sons only); *A-G v Sutton* (1721) 1 P Wms 754, HL (first and second sons only); *Stanley v Lennard* (1758) 1 Eden 87 (eldest son only); *Key v Key* (1853) 4 De GM & G 73 at 80 (eldest surviving son).

5 *Parr v Swindels* (1828) 4 Russ 283.

6 *Target v Gaunt* (1718) 1 P Wms 432; *Hockley v Mawbey* (1790) 3 Bro CC 82; *Ryan v Cowley* (1835) L & G temp Sugd 7; *Leeming v Sherratt* (1842) 2 Hare 14; *Eastwood v Avison* (1869) LR 4 Exch 141.

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744. Other cases.

If a person predeceases a life tenant without leaving issue, a gift over (whether of real or personal estate) which is to take place when the interest given will vest in possession¹ extends to the event of the person and his issue dying in the lifetime of the life tenant².

1 Cf *Dunn v Morgan* (1915) 84 LJ Ch 812 (where 'die without issue' meant without leaving issue surviving him; and, as the interests had previously vested in possession and the gift over would divest them, a construction was adopted which would avoid the uncertainty of divesting).

2 *Crowder v Stone* (1829) 3 Russ 217; *Jarman v Vye* (1866) LR 2 Eq 784.

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745. Rules where the statutory rule does not apply.

In general¹, in gifts not within the statutory rule² (whether the gift is of real estate³ or personal estate⁴ or both together⁵), words importing failure of issue import an indefinite failure of issue at any time, however remote⁶, unless the context of the will or the nature of the gift⁷ shows an intention to the contrary. A contrary intention is shown, for example, where the issue is referred to as surviving a living person⁸, or where the context shows that 'issue' means 'children'⁹. Similarly, if the gift over is directed to take effect 'at the death' of the ancestor (a prior donee under the will), this is some indication, but not a conclusive indication¹⁰, that the failure of issue is confined to the death of the prior donee¹¹. If the gift over could not reasonably be meant to depend on a general failure of issue, the inference is that a failure at the death of the named ancestor is intended¹².

1 As to the exceptions see PARA 746 post.

2 Ie not within the Wills Act 1837 s 29 (see PARA 740 ante), either as being prior to it or as being within s 29 proviso (see PARA 742 ante): see *Re Bence, Smith v Bence* [1891] 3 Ch 242, CA.

3 *Lee's Case* (1584) 1 Leon 285; *Newton v Barnardine* (1587) Moore KB 127; *Lady Lanesborough v Fox* (1733) Cas temp Talb 262, HL; *Cole v Goble* (1853) 13 CB 445. See also the cases as to death 'without leaving issue' cited in PARA 746 note 4 post. As to the implication of an estate tail under the old law in such a case see PARA 760 post.

4 *Beauclerk v Dormer* (1742) 2 Atk 308; *Gray v Shawne* (1758) 1 Eden 153; *Destouches v Walker* (1764) 2 Eden 261; *Howston v Ives* (1764) 2 Eden 216; *Grey v Montagu* (1770) 3 Bro Parl Cas 314; *Bigge v Bensley* (1783) 1 Bro CC 187; *Glover v Strothoff* (1786) 2 Bro CC 33; *Everest v Gell* (1791) 1 Ves 286; *Chandless v Price* (1796) 3 Ves 99 at 101; *Rawlins v Goldfrap* (1800) 5 Ves 440; *Lepine v Ferard* (1831) 2 Russ & M 378; *Candy v Campbell* (1834) 2 Cl & Fin 421, HL; *Falkiner v Hornidge* (1858) 8 I Ch R 184; *Re Johnson's Trusts* (1866) LR 2 Eq 716 at 720; *Fisher v Webster* (1872) LR 14 Eq 283.

5 *Salkeld v Vernon, Salkeld v Salkeld* (1758) 1 Eden 64; *Jeffery v Sprigge* (1784) 1 Cox Eq Cas 62; *Boehm v Clarke* (1804) 9 Ves 580; *Barlow v Salter* (1810) 17 Ves 479; *Donn v Penny* (1815) 1 Mer 20.

6 As to the possible objection as regards remoteness in such cases see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1024.

7 *King v Withers* (1735) Cas temp Talb 117 at 121; *Campbell v Harding* (1831) 2 Russ & M 390 at 406. Thus in cases where the property is a leasehold for lives, the failure must occur within the lives of the cestuis que vie: *Low v Burron* (1734) 3 P Wms 262; *Campbell v Harding* supra at 406. Where, however, the leasehold was renewable for ever, the effect in a case under the law prior to the Wills Act 1837 was that the failure might be indefinitely remote, and in such cases an estate in quasi-entail was created: *Croly v Croly* (1825) Batt 1; *Manning v Moore* (1832) Alc & N 96; *Lee v Flinn* (1833) Alc & N 418.

8 *Baker v Lucas* (1828) 1 Mol 481; *Gee v Liddell* (1866) LR 2 Eq 341.

9 *Doe d Lyde v Lyde* (1787) 1 Term Rep 593; *Carter v Bentall* (1840) 2 Beav 551; *Bryan v Mansion* (1852) 5 De G & Sm 737.

10 *Walter v Drew* (1723) 1 Com 373; *Theebridge v Kilburne* (1751) 2 Ves Sen 233 at 236; *Doe d Cock v Cooper* (1801) 1 East 229.

11 *Pinbury v Elkin* (1719) 1 P Wms 563; *Trotter v Oswald* (1787) 1 Cox Eq Cas 317; *Wilkinson v South* (1798) 7 Term Rep 555; *Gawler v Cadby* (1821) Jac 346 at 348; *Rackstraw v Vile* (1824) 1 Sim & St 604, following *Doe d King v Frost* (1820) 3 B & Ald 546 (commented on in Lewis's Law of Perpetuity 234-235); *Ex p Davies* (1851) 2 Sim NS 114. As to the use of the word 'then' see *Campbell v Harding* (1831) 2 Russ & M 390 at 410; *Pye v Linwood* (1842) 6 Jur 618.

12 *Re Rye's Settlement* (1852) 10 Hare 106 at 111.

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746. Exceptions to the statutory rule.

There are recognised exceptions to the statutory rule, and rules have been adopted as to wills not subject to the statutory rule¹, as follows:

- 71 (1) where the subject matter is personal estate, a gift on a death 'without leaving issue' is prima facie confined to a failure of issue at death², but, where the subject matter is real estate, the gift prima facie³ extends to an indefinite failure of issue⁴; where real estate and personal estate are comprised in the same gift, the words are construed differently, according to the subject matter⁵;
- 72 (2) a gift of property to which the testator is entitled in possession, to take effect on failure of his own issue, not preceded by any other gift, is not a future gift but is a gift in possession at the testator's death in the event of there being at that time a failure of his issue⁶;
- 73 (3) where the testator under the limitations of another instrument is entitled in remainder or reversion on failure of the issue, or the issue male or female, of any person, and the testator makes a gift of the property, not preceded by any other limitation, on failure of that issue, these words do not make the gift a future gift but are merely a description of the testator's interest⁷; the question in such cases is whether the issue referred to in the will is the same as or is different from the issue capable of taking under the other instrument⁸;
- 74 (4) where the court finds an intention that the persons entitled under the gift over are to enjoy the benefits of their gift as a personal provision during their lives, and are not merely to take interests which are not vested in possession but vested in right, the inference may be drawn that the failure of issue is confined to the lives of those persons⁹; this is so, for example, where the gift over provides for a charge of a legacy, intended as a personal provision¹⁰, or where the gift over is to such of a number of named or described persons as are living at the time of failure¹¹; the inference also arises in a gift over to the survivors of the persons, failure of whose issue is contemplated, where 'survivors' is used in its ordinary sense of surviving

the failure of issue¹², but not where 'survivor' means 'the longest liver'¹³ or 'surviving stirps' or 'other'¹⁴; similarly, where the only interest taken under the gift over is a life interest, or succession of life interests, it can be inferred that the failure of issue is confined to the lives of the donees under the gift over¹⁵;

- 75 (5) where, after a devise to a person and his heirs¹⁶, or after a bequest to a person absolutely¹⁷, there is a gift over on his dying under or over a certain age without issue, the compound event is restricted to his dying under or over that age without issue living at his death.

1 For the statutory rule see the Wills Act 1837 s 29; and PARA 740 ante. As to the rules adopted where s 29 does not apply see PARA 745 ante.

2 *Forth v Chapman* (1720) 1 P Wms 663; *Atkinson v Hutchinson* (1734) 3 P Wms 258; *Sabbarton v Sabbarton* (1738) Cas temp Talb 55, 245; *Sheffield v Lord Orrery* (1745) 3 Atk 282 at 287; *Lamplsey v Blower* (1746) 3 Atk 396; *Sheppard v Lessingham* (1751) Amb 122; *Taylor v Clarke* (1763) 2 Eden 202; *Gordon v Adolphus* (1769) 3 Bro Parl Cas 306; *Goodtitle d Peake v Pegden* (1788) 2 Term Rep 721; *Radford v Radford* (1836) 1 Keen 486; *Daniel v Warren* (1843) 2 Y & C Ch Cas 290; *Mansell v Grove* (1843) 2 Y & C Ch Cas 484; *Hawkins v Hamerton* (1848) 16 Sim 410; *Re Synge's Trusts* (1854) 3 L Ch R 379; *Sealy v Stawell* (1868) IR 2 Eq 326 at 353; *Auger v Beaudry* [1920] AC 1010, PC.

3 For instances of a context to the contrary see *Porter v Bradley* (1789) 3 Term Rep 143 (leaving . . . behind him); *Roe d Sheers v Jeffery* (1798) 7 Term Rep 589, following *Pells v Brown* (1620) Cro Jac 590 (gift over of life estates to living persons). Although these cases have been criticised, they do not appear to be overruled: see *Van Tassel v Frederick* (1896) 27 OR 646 at 648. Cf head (4) in the text.

4 *Walter v Drew* (1723) 1 Com 373; *Denn d Geering v Shenton* (1776) 1 Cowp 410; *Tenny d Agar v Agar* (1810) 12 East 253; *Dansey v Griffiths* (1815) 4 M & S 61; *Franklin v Lay* (1820) 6 Madd 258; *Wollen v Andrewes* (1824) 2 Bing 126; *Heather v Winder* (1835) 5 LJ Ch 41; *Doe d Cadogan v Ewart* (1838) 7 Ad & El 636; *Bamford v Lord* (1854) 14 CB 708; *Feakes v Standley* (1857) 24 Beav 485; *Biss v Smith* (1857) 2 H & N 105; *Richards v Davies* (1862) 13 CBNS 69 (affd 13 CBNS 861, Ex Ch); *Re Thomas, Thomas v Thomas* [1921] 1 Ch 306. In such cases an implied estate tail might formerly have arisen: see PARA 760 post.

5 *Forth v Chapman* (1720) 1 P Wms 663; *Sheffield v Lord Orrery* (1745) 3 Atk 282 at 287; *Radford v Radford* (1836) 1 Keen 486; *Greenway v Greenway* (1860) 2 De GF & J 128 at 137.

6 *French v Caddell* (1765) 3 Bro Parl Cas 257, HL; *Wellington v Wellington* (1768) 4 Burr 2165; *Lytton v Lytton* (1793) 4 Bro CC 441; *Sanford v Irby* (1820) 3 B & Ald 654.

7 *Badger v Lloyd* (1699) 1 Ld Raym 523; *Lytton v Lytton* (1793) 4 Bro CC 441; *Egerton v Jones* (1830) 3 Sim 409.

8 *Sanford v Irby* (1820) 3 B & Ald 654; *Morse v Lord Ormonde* (1826) 1 Russ 382; *Eno v Eno* (1847) 6 Hare 171; *Lewis v Templer* (1864) 33 Beav 625 (in these cases the issue was the same); *Lady Lanesborough v Fox* (1733) Cas temp Talb 262, HL; *Jones v Morgan* (1774) 3 Bro Parl Cas 323; *Banks v Holme* (1821) 1 Russ 394n, HL (in these cases the issue was different).

9 *Doe d Smith v Webber* (1818) 1 B & Ald 713 at 721.

10 *Nichols v Hooper* (1712) 1 P Wms 198; *Doe d Smith v Webber* (1818) 1 B & Ald 713 at 721. The mere fact of a legacy given on failure of issue is insufficient: see *Doe d Todd v Duesbury* (1841) 8 M & W 514.

11 *Murray v Addenbrook* (1830) 4 Russ 407 at 419; *Greenwood v Verdon* (1854) 1 K & J 74 at 81.

12 *Hughes v Sayer* (1718) 1 P Wms 534; *Ranelagh v Ranelagh* (1834) 2 My & K 441 at 448; *Turner v Frampton* (1846) 2 Coll 331; *Westwood v Southey* (1852) 2 Sim NS 192 at 201. See also *Massey v Hudson* (1817) 2 Mer 130 (where a substitutional gift to the personal representatives of the survivor excluded the presumption).

13 *Chadock v Cowley* (1624) Cro Jac 695.

14 As to the usual meanings of 'survive', and as to the use of words such as 'survivors' see PARAS 606-607 ante.

15 *Trafford v Boehm* (1746) 3 Atk 440 at 494; *Roe d Sheers v Jeffery* (1798) 7 Term Rep 589 (where the failure was said to be confined to the life of the prior donee). Cf *Lepine v Ferard* (1831) 2 Russ & M 378 at 398

per Lord Brougham. This is not the case where life interests are not the only interests arising under the gift over; the mere fact that the next interest under the gift over is for life is insufficient: *Boehm v Clarke* (1804) 9 Ves 580 at 582; *Barlow v Salter* (1810) 17 Ves 479 at 482; *Doe d Jones v Owens* (1830) 1 B & Ad 318 at 320-321.

16 *Toovey v Bassett* (1809) 10 East 460; *Right d Day v Day* (1812) 16 East 67; *Glover v Monckton* (1825) 3 Bing 13; *Doe d Johnson v Johnson* (1852) 8 Exch 81; *Gwynne v Berry* (1875) IR 9 CL 494.

17 *Pawlet v Dogget* (1688) 2 Vern 86; *Martin v Long* (1690) 2 Vern 151 (leaseholds). See also *Morris v Morris* (1853) 17 Beav 198 (where there was a gift over if the prior donee should die without issue or before 21, and where 'or' was construed as 'and' as it would have been before the Wills Act 1837); *Re Morgan* (1883) 24 ChD 114.

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747. Other gifts over.

A devise over on death without having or leaving an heir or male heir or heirs of the body¹ prima facie² refers to a failure of such heirs at any time³.

In order not to disappoint more remote generations of issue, a devise over of real property on a death without children, either after a prior gift in fee or generally without words of limitation, may be construed as taking effect on death and failure of issue either indefinitely⁴ or within a limited time, for example before the death of the named ancestor⁵, according to the context. Prima facie the words 'child or children' mean what they say, but it is open to the court to give them a wider meaning, as synonymous with 'issue'⁶. A similar gift over of personal property prima facie refers to a failure of children at the death of the named parent⁷. The words are not considered to mean a failure of issue indefinitely if the effect is to defeat the testator's intention, and, especially in bequests of personal property, the ordinary meaning of 'children' is adhered to⁸, but in some cases a similar rule to that in the case of real property may be applied to personal property⁹.

A gift over on death 'without having children' is construed as on death 'without having had children', and fails to take effect if the parent has had a child, even though no child survives him¹⁰.

1 Such an expression is not subject to the Wills Act 1837 s 29: see PARA 740 note 4 ante.

2 For instances where the context showed an intention to the contrary see *Polley v Polley* (1861) 29 Beav 134; *Coltsmann v Coltsmann* (1868) LR 3 HL 121; *Re Leach, Leach v Leach* [1912] 2 Ch 422.

3 *Nottingham v Jennings* (1700) 1 P Wms 23; *A-G v Hird* (1782) 1 Bro CC 170; *Crooke v De Vandes* (1803) 9 Ves 197.

4 *Milliner v Robinson* (1600) Moore KB 682 (sub nom *Bifield's Case* cited in 1 Vent at 231) (devise to A with a gift over on his death not leaving a son); *Doe d Blesard v Simpson* (1842) 3 Man & G 929 at 954, Ex Ch; *Bacon v Cosby* (1851) 4 De G & Sm 261; *Re Milward's Estate, ex p Midland Rly Co* [1940] Ch 698 at 703.

5 *Doe d Smith v Webber* (1818) 1 B & Ald 713; *Re Milward's Estate, ex p Midland Rly Co* [1940] Ch 698. See also *Parker v Birks* (1854) 1 K & J 156; *Richards v Davies* (1862) 13 CBNS 69 at 87 per Byles J (affd (1863) 13 CBNS 861); *Re Thomas, Vivian v Vivian* [1920] 1 Ch 515.

6 *Re Milward's Estate, ex p Midland Rly Co* [1940] Ch 698 at 705.

7 *Hughes v Sayer* (1718) 1 P Wms 534; *Pleydell v Pleydell* (1721) 1 P Wms 748; *Thicknesse v Liege* (1775) 3 Bro Parl Cas 365; *Re Booth, Pickard v Booth* [1900] 1 Ch 768 (where *Jeffreys v Conner* (1860) 28 Beav 328 is explained); *Re Raphael, Permanent Trustee Co of New South Wales Ltd v Lee* (1903) 3 SRNSW 196.

8 *Studholme v Hodgson* (1734) 3 P Wms 300 at 304; *Stone v Maule* (1829) 2 Sim 490; *Mathews v Gardiner* (1853) 17 Beav 254; *Jeffreys v Conner* (1860) 28 Beav 328.

9 *Re Synges Trusts* (1854) 3 I Ch R 379.

10 *Weakley d Knight v Rugg* (1797) 7 Term Rep 322; *Bell v Phyn* (1802) 7 Ves 453; *Wall v Tomlinson* (1810) 16 Ves 413; *Jeffreys v Conner* (1860) 28 Beav 328. See also *Re Johnston and Smith* (1906) 12 OLR 262; *M'Kay v M'Allister* (1912) 46 ILT 88, Ir CA; *Chunilal Parvatishankar v Bai Samrath* (1914) 30 TLR 407, PC (cases of gifts over on death without having 'issue').

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C. FORFEITURE ON ALIENATION

748. Object of forfeiture clauses.

A life or other limited interest can be validly given subject to a forfeiture clause on bankruptcy or alienation or on similar events¹. Such clauses are construed strictly². Words may, however, be used which compel the court to hold that in the circumstances a forfeiture has been incurred, even though, apart from the forfeiture clause, the interest has been preserved³. Even in the absence of express words to that effect, forfeiture is not incurred by a consent to an advance, whether the advance is made under an express power contained in the will⁴ or under the statutory power⁵ of advancement⁶.

In all cases the burden lies on those who assert that forfeiture has taken place⁷.

1 As to what interests may validly be made subject to such forfeiture clauses see GIFTS vol 52 (2009) PARA 254; PERSONAL PROPERTY vol 35 (Reissue) PARA 1268 et seq. As to the construction of forfeiture clauses with respect to references to bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 405-409. For a forfeiture clause on alienation except an alienation by way of settlement see *Re Galsworthy*, *Galsworthy v Galsworthy* [1922] 2 Ch 558.

2 *Re Mair, Williamson v French* [1909] 2 Ch 280 at 282 (charge withdrawn before dividends accrued; no forfeiture). See also *Re Sheward, Sheward v Brown* [1893] 3 Ch 502 (document on the face of it a charge, but not intended as such; no forfeiture); *Re Evans, Public Trustee v Evans* [1920] 2 Ch 304, CA; *Re Bell, Bell v Agnew* (1931) 47 TLR 401; *Re Walker, Public Trustee v Walker* [1939] Ch 974, [1939] 3 All ER 902.

3 *Hurst v Hurst* (1882) 21 ChD 278, CA (disclaimer by chargee); *Re Porter, Coulson v Capper* [1892] 3 Ch 481; *Re Baker, Baker v Baker* [1904] 1 Ch 157 (charges, even though cancelled by creditors before distribution).

4 *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34; *Re Shaw's Settlement Trusts, Shaw v Shaw* [1951] Ch 833, [1951] 1 All ER 656.

5 As to this statutory power see the Trustee Act 1925 s 32 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76 et seq; TRUSTS vol 48 (2007 Reissue) PARA 1050.

6 *Re Rees, Lloyds Bank Ltd v Rees* [1954] Ch 202, [1954] 1 All ER 7. *Re Stimpson's Trusts* [1931] 2 Ch 77, to the contrary, was doubted in *Re Shaw's Settlement Trusts, Shaw v Shaw* [1951] Ch 833 at 840, [1951] 1 All ER 656 at 659 and *Re Rees, Lloyds Bank Ltd v Rees* supra. See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76 et seq; SETTLEMENTS vol 42 (Reissue) PARA 917.

7 *Cox v Bockett* (1865) 35 Beav 48 at 51.

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749. Effect of forfeiture clauses.

Whether an act or event causes a forfeiture¹ depends on the true construction of the forfeiture clause, for example whether a definite act on the donee's part is required or whether the clause goes further and contemplates events where he is passive². There is, however, no forfeiture if there is no loss of the beneficial right to enjoy the property³ as the payments of income accrue due⁴, and there is no vesting of the right in another person⁵. Forfeiture clauses on alienation prima facie refer to alienation by way of anticipation and do not, unless so expressed⁶, refer to dispositions of income already accrued due or already vested in the donee⁷. If a doubt arises whether a document of alienation is intended to deal with income already accrued due or with future income only, the court favours the construction which prevents a forfeiture⁸.

No forfeiture is caused where the donee, in good faith and not as a contrivance to evade the clause⁹, gives a power of attorney or authority to receive the income.

A power of attorney given for value as a colourable assignment or for the express purpose of passing the property to a creditor may, however, cause forfeiture¹⁰.

1 As to the events causing forfeiture in relation to protective trusts under the Trustee Act 1925 s 33 (as amended) see SETTLEMENTS vol 42 (Reissue) PARA 918.

2 *Re Pozot's Settlement Trusts, Westminster Bank Ltd v Guerbois* [1952] Ch 427 at 445, [1952] 1 All ER 1107 at 1117, CA. See also PARA 751 post.

3 *Lockwood v Sikes* (1884) 51 LT 562; *Re Selby, Church v Tancred* [1903] 1 Ch 715.

4 *Re Sampson, Sampson v Sampson* [1896] 1 Ch 630, followed in *Re Jenkins, Williams v Jenkins* [1915] 1 Ch 46. As to the effect of such a clause on income accruing due during a conditional discharge in bankruptcy see *Re Clark, Clark v Clark* [1926] Ch 833.

5 *Re Brewer's Settlement, Morton v Blackmore* [1896] 2 Ch 503 (loan of trust fund to life tenant, who spent it; income payable to him did not become 'vested in' another person). As to a petition in bankruptcy not followed by a bankruptcy order see SETTLEMENTS vol 42 (Reissue) PARA 919. Cf *Re Broughton, Peat v Broughton* (1887) 57 LT 8. See also *Craven v Brady* (1869) 4 Ch App 296 (forfeiture on being deprived of control of rents; marriage under law before 1883 caused forfeiture); *Re Dash, Darley v King, King v Darley* (1887) 57 LT 219 (conviction; no administrator appointed; no forfeiture); *Re Beaumont, Woods v Beaumont* (1910) 79 LJ Ch 744 (appointment of receiver caused no vesting in another person); *Re Mordaunt, Mordaunt v Mordaunt* (1914) 49 L Jo 225 (debt, although postponed to capital falling into possession, also charged on present income); *Re Crother's Trusts* [1915] 1 IR 53. Cf *Bonfield v Hassell* (1863) 32 LJ Ch 475 (marriage caused no forfeiture of annuity). As to a clause of forfeiture on the interest being taken in execution see *Blackman v Fysh* [1892] 3 Ch 209, CA (receiver).

6 *Bates v Bates* [1884] WN 129; dissented from, however, in *Re Greenwood, Sutcliffe v Gledhill* [1901] 1 Ch 887 at 893.

7 *Re Stulz's Trusts, ex p Kingsford* (1853) 4 De GM & G 404 at 409 (where the testator even provided for attempts 'to anticipate or otherwise assign or incumber' the bequest); *Sutton, Carden & Co v Goodrich* (1899) 80 LT 765; *Re Greenwood, Sutcliffe v Gledhill* [1901] 1 Ch 887.

8 *Cox v Bockett* (1865) 35 Beav 48; *Durran v Durran* (1904) 91 LT 819 at 820, CA.

9 *Croft v Lumley* (1858) 6 HL Cas 672 (covenant in lease); *Avison v Holmes, Penny v Avison* (1861) 1 John & H 530; *Re Swannell, Morice v Swannell* (1909) 101 LT 76; *Smith v Perpetual Trustee Co Ltd* (1910) 11 CLR 148.

10 *Doe d Mitchinson v Carter* (1799) 8 Term Rep 300; *Doe d Duke of Norfolk v Hawke* (1802) 2 East 481; *Wilkinson v Wilkinson* (1819) 3 Swan 515; *Oldham v Oldham* (1867) LR 3 Eq 404.

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750. Forfeiture on alienation.

Where a forfeiture clause provides for forfeiture on alienation only, no forfeiture is caused by events in which the beneficiary plays a purely passive role¹ or by acts done by other persons against the donee's will, such as a charging order², or appointment of a receiver³, or an alienation by order of the court under its power⁴ to authorise dealings with trust property⁵, or by any proceedings in bankruptcy commenced by creditors without the concurrence of the donee⁶. A charge by a life tenant after a receiver for him had been appointed in lunacy was void and did not give rise to a forfeiture⁷.

Unless the clause extends to an attempted assignment, it is not brought into operation by a mere attempt to assign or by an assignment which is nugatory⁸. Even where the clause extends to an attempt to assign, mere negotiations for an assignment⁹ or the giving of an authority to receive the income¹⁰ are insufficient to bring the clause into operation; but a settlement, although invalid, may give rise to a forfeiture in such a case¹¹.

1 *Re Pozot's Settlement Trusts, Westminster Bank Ltd v Guerbois* [1952] Ch 427 at 445, [1952] 1 All ER 1107 at 1117, CA.

2 *Re Kelly's Settlement, West v Turner* (1888) 59 LT 494.

3 *Campbell v Campbell and Davis* (1895) 72 LT 294.

4 See the Trustee Act 1925 s 57; and TRUSTS vol 48 (2007 Reissue) PARA 1061.

5 *Re Mair, Richards v Doxat* [1935] Ch 562. See also *Re Salting, Baillie-Hamilton v Morgan* [1932] 2 Ch 57.

6 See *Whitfield v Prickett* (1838) 2 Keen 608; *Graham v Lee* (1857) 23 Beav 388; and SETTLEMENTS vol 42 (Reissue) PARA 919. It is otherwise where the clause provides for forfeiture on bankruptcy: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 405-406. Cf *Doe d Mitchinson v Carter* (1798) 8 Term Rep 57 at 61.

7 *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284. A charge after the appointment of a receiver under the Mental Health Act 1983 s 99 would probably also be void: see MENTAL HEALTH vol 30(2) (Reissue) PARA 704 et seq.

8 *Re Wormald, Frank v Muzeen* (1890) 43 ChD 630; *Re Adamson, Public Trustee v Billing* (1913) 109 LT 25 (cases where a restraint on anticipation made the assignment nugatory).

9 *Graham v Lee* (1857) 23 Beav 388.

10 *Wilkinson v Wilkinson* (1819) 3 Swan 515. See also the cases cited in PARA 749 note 10 ante.

11 *Re Porter, Coulson v Capper* [1892] 3 Ch 481; *Re Sheward, Sheward v Brown* [1893] 3 Ch 502 (where no forfeiture was caused by a document amounting to, but not intended to be, an equitable assignment and which could have been set aside in proceedings for that purpose).

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751. Forfeiture where the donee is a passive or unwilling party.

The forfeiture clause may go further and provide for forfeiture if the donee does or suffers any act by which the income would, but for the provisions of the forfeiture clause, become payable to another¹. In such cases, the use of expressions such as 'suffer' or 'permit' indicate that even a passive attitude of the donee may suffice to cause forfeiture². If the clause is restricted to cases where the income would become payable to or vested in another, no forfeiture is caused by any proceedings which do not have that effect³; but on the wording of the clause it may in some cases be sufficient if the donee is deprived of personal enjoyment of the income⁴. Whether an order made under trading with the enemy legislation⁵ causes a forfeiture depends on the wording of the clause; such an order is an event causing the income to become payable to⁶ but not vested in⁷ another, but it is not an act permitted or suffered by the beneficiary⁸.

Where the clause provided for forfeiture if the beneficiary should be unable to give a personal discharge, no forfeiture was incurred by the appointment of a receiver in lunacy⁹.

1 This is so where the income is directed to be held on the statutory protective trusts: see *SETTLEMENTS* vol 42 (Reissue) PARA 917. These also provide for forfeiture if any event happens by which the beneficiary would be deprived of his right to receive capital or income: see *Re Richardson's Will Trusts, Public Trustee v Llewellyn Evans' Trustee* [1958] Ch 504, [1958] 1 All ER 538; *Edmonds v Edmonds* [1965] 1 All ER 379n, [1965] 1 WLR 58.

2 *Roffey v Bent* (1867) LR 3 Eq 759 (charging order); *Re Throckmorton, ex p Eyston* (1877) 7 ChD 145, CA (hostile bankruptcy); *Re Moore* (1885) 17 LR Ir 549 (registration of a judgment); *Re Detmold, Detmold v Detmold* (1889) 40 ChD 585 (insolvency); *Re Sartoris's Estate, Sartoris v Sartoris* [1892] 1 Ch 11, CA (receiving order) (followed in *Re Laye, Turnbull v Laye* [1913] 1 Ch 298). See also *BANKRUPTCY AND INDIVIDUAL INSOLVENCY* vol 3(2) (2002 Reissue) PARAS 405-406. As to the meaning of 'suffer any process' see note 8 infra.

3 *Re James, Clutterbuck v James* (1890) 62 LT 545 (Scottish sequestration; no vesting of property in another); *Re Ryan* (1887) 19 LR Ir 24 (execution on cattle); *Re Moon, ex p Dawes* (1886) 17 QBD 275 (filing of bankruptcy petition, not followed by adjudication). There was no forfeiture where the beneficiary authorised payment to another of a dividend which he expected, but the authority was rendered nugatory by the company failing to declare the dividend: *Re Longman, Westminster Bank Ltd v Hatton* [1955] 1 All ER 455, [1955] 1 WLR 197.

4 *Re Baring's Settlement Trusts, Baring Bros & Co Ltd v Liddell* [1940] Ch 737, [1940] 3 All ER 20 (sequestration); *Re Hatch, Public Trustee v Hatch* [1948] Ch 592, [1948] 2 All ER 288 (beneficiary residing in enemy territory); *Re Richardson's Will Trusts, Public Trustee v Llewellyn Evans' Trustee* [1958] Ch 504, [1958] 1 All ER 538 (equitable charge created by court order in divorce proceedings); *Edmonds v Edmonds* [1965] 1 All ER 379n, [1965] 1 WLR 58 (attachment of earnings order in divorce proceedings).

5 Eg the Trading with the Enemy Act 1939: see *WAR AND ARMED CONFLICT* vol 49(1) (2005 Reissue) PARA 576 et seq.

6 *Re Gourju's Will Trusts, Starling v Custodian of Enemy Property* [1943] Ch 24, [1942] 2 All ER 605. See also *Re Pozot's Settlement Trusts, Westminster Bank Ltd v Guerbois* [1952] Ch 427 at 450-451, 453, [1952] 1 All ER 1107 at 1121-1122, CA.

7 *Re Pozot's Settlement Trusts, Westminster Bank Ltd v Guerbois* [1952] Ch 427, [1952] 1 All ER 1107, CA. As to the effect of an order under earlier legislation see *Re Levinstein, Levinstein v Levinstein* [1921] 2 Ch 251; *Re Biedermann, Best v Wertheim* [1922] 2 Ch 771, CA (both cases of charges under the Treaty of Peace (Austria) Order 1920, SR & O 1920/1613).

8 *Re Hall, Public Trustee v Montgomery* [1944] Ch 46, [1943] 2 All ER 753; *Re Harris, Cope v Evans* [1945] Ch 316, [1945] 1 All ER 702 (where it was also held that the words 'suffer any process' in the forfeiture clause meant some form of legal process and could not refer to the passing of an Act of Parliament or the making of an Order in Council or the giving of any direction under any such order).

9 *Re Oppenheim's Will Trusts, Westminster Bank Ltd v Oppenheim* [1950] Ch 633, [1950] 2 All ER 86. On the ratio of that decision, that the clause was not intended to operate where the income would remain for the benefit of the donee (cf para 748 ante), it seems that no forfeiture should be incurred under such a clause on the appointment of a receiver under the Mental Health Act 1983 s 99 (replacing the Mental Health Act 1959 s 105 (repealed)) (see *MENTAL HEALTH* vol 30(2) (Reissue) PARA 704 et seq.).

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(5) IMPLIED GIFTS

752. Gifts by implication.

The reading of words into a will as a matter of necessary implication is a measure which will be applied only with the greatest caution, and is legitimate only where the court can gather from the will as a whole that something has been omitted and, with sufficient precision, the nature of the omission¹. Accordingly, limitations and gifts will arise by necessary implication only where there is so strong a probability of intention shown by the words of the will that a contrary intention cannot be supposed².

Implication may be founded on two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded on the form of gift, or on a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction³. Thus if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to create, the court will supply the defect by implication and thus mould his language so as to carry into effect, as far as possible, the intention which it considers the testator has sufficiently declared in the will as a whole⁴. The doctrine arises where, in order to fulfil the testator's intentions which are manifest from the words of the will, there is a gap to be filled up in the dispositions⁵. A construction which leads to an intestacy should be avoided unless the language necessarily leads to this result⁶.

An interest will not be implied in favour of any person for whom it cannot be said that the testator intended to provide⁷.

1 *Re Whitrick, Sutcliffe v Sutcliffe* [1957] 2 All ER 467 at 469, [1957] 1 WLR 884 at 887-888, CA. See also *Re Follett, Barclays Bank Ltd v Dovell* [1955] 2 All ER 22, [1955] 1 WLR 429, CA. As to implied gifts to a class in default of the exercise of a power of appointment see POWERS vol 36(2) (Reissue) PARAS 210-211; and as to reading in words in a clause of defeasance see PARA 726 et seq ante.

2 *Wilkinson v Adam* (1813) 1 Ves & B 422 at 466 per Lord Eldon LC; *Crook v Hill* (1871) 6 Ch App 311 at 315 per James LJ. See also *Roe d Bendale v Summerset* (1770) 5 Burr 2608 at 2609; *Upton v Lord Ferrers* (1801) 5 Ves 801 at 806; *R v Ringstead Inhabitants* (1829) 9 B & C 218 at 224; *Scalé v Rawlins* [1892] AC 342, HL.

3 *Parker v Tootal* (1865) 11 HL Cas 143 at 161 per Lord Westbury LC.

4 *Towns v Wentworth* (1858) 11 Moo PCC 526 at 543 per Lord Kingsdown (followed in *Sweeting v Prideaux* (1876) 2 ChD 413 at 416); *Re Redfern, Redfern v Bryning* (1877) 6 ChD 133; *Mellor v Daintree* (1886) 33 ChD 198 at 206; *Re Smith, Veasey v Smith* [1948] Ch 49, [1947] 2 All ER 708; *Re Segelman* [1996] Ch 171 at 193-194, [1995] 3 All ER 676 at 693.

5 *Watkins v Frederick* (1865) 11 HL Cas 358 at 374. See eg *Saunders v Lowe* (1775) 2 Wm Bl 1014 (where there was a gift to trustees during the lives of four daughters and the survivor, on trust for the survivor and the child or children of such daughters who should first die); *Re Morton, M'Auley v Harvey* (1919) 53 ILT 105.

6 *Re Ragdale, Public Trustee v Tuffill* [1934] Ch 352; *Re Geering, Gulliver v Geering* [1964] Ch 136 at 147, [1962] 3 All ER 1043 at 1049 per Cross J. As to the presumption against intestacy see PARAS 546-548 ante.

7 *Monypenny v Dering* (1852) 2 De GM & G 145 at 174; *Re Rising, Rising v Rising* [1904] 1 Ch 533; *Re Mortimer, Gray v Gray* [1905] 2 Ch 502, CA.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/753. Nature of implication.

753. Nature of implication.

Gifts may be given by implication to persons not mentioned in the will¹, to persons so mentioned but not as objects of the testator's bounty² and, by the extension of the words of the express gift to cover interests which those words, taken alone, would not create, to persons mentioned as objects of the testator's bounty³.

Gifts are not implied where the only question is the manner in which the words are to be read, and no interest is inferred which the words of the gift taken in some sense or other would not create⁴; nor are gifts implied where words are altered or supplied as being erroneously written or omitted, so long as the quantum of interest conferred on the donees under the will is unchanged⁵. An interest cannot be raised by implication in a gift of another person's property under the doctrine of election⁶, nor, in general, by a mere erroneous recital of a right which the testator considers to belong to the person claiming the implied estate⁷.

1 See the cases cited in PARA 754 notes 3-5 post.

2 See PARA 754 post. As to the effect of recitals that a certain person is entitled to a certain interest either as constituting a gift to that person of that interest or otherwise see PARA 543 ante.

3 See PARA 757 post.

4 *Tunaley v Roch* (1857) 3 Drew 720 at 725; *Crumpe v Crumpe* [1900] AC 127 at 132-133, HL, per Lord Ashbourne. See also *Ramsden v Hassard* (1791) 3 Bro CC 236; *Acheson v Fair* (1843) 3 Dr & War 512 at 527; *Greenwood v Greenwood* (1877) 5 ChD 954, CA.

5 As to the alteration of words see PARAS 544-545 ante. For examples where whole limitations were inserted see *Mellor v Daintree* (1886) 33 ChD 198; *Phillips v Rail* (1906) 54 WR 517.

6 *Dashwood v Peyton* (1811) 18 Ves 27 at 48. As to the doctrine of election see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

7 *Dashwood v Peyton* (1811) 18 Ves 27 at 41, 48 (discussing *Tilly v Tilly* (1743) (unreported), cited in *Dashwood v Peyton* supra at 43). As to recitals showing an intended gift see PARA 543 ante.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/754. Examples of implied gifts.

754. Examples of implied gifts.

A life estate has been held to be impliedly conferred on a person where the will contains a gift after the death of that person, and the court has from the context of the will inferred an intention on the testator's part that that person should enjoy the property in the meantime¹. In general, however, a gift after the death of any person does not by implication confer on him any interest². From a declared intention to provide for posthumous children, it may in some instances be inferred that the testator intended to provide for children born in his lifetime after the date of his will³, but this is not an inference to be drawn in all cases⁴. Words of exclusion, for example a direction that certain of a specified class of persons are not to take any benefit, may imply a gift to the other members of the class⁵. Similarly, a declaration excluding some of those who would be entitled on an intestacy may imply a gift to those not so excluded⁶. Where the testatrix provided only for her husband's death before or within one month after her decease, an absolute gift to him in the event of his surviving that period was implied⁷. In some cases,

where the omission is clear, a power of appointment⁸ or trust in default of appointment⁹ has been implied.

1 *Roe d Bendall v Summerset* (1770) 2 Wm Bl 692; *Bird v Hunsdon* (1818) 3 Swan 342; *Townley v Bolton* (1832) 1 My & K 148; *Re Smith's Trusts* (1865) LR 1 Eq 79; *Re Blake's Trust* (1867) LR 3 Eq 799. See also *Blackwell v Bull* (1836) 1 Keen 176; *Cockshott v Cockshott* (1846) 2 Coll 432; *Allin v Crawshay* (1851) 9 Hare 382. All these cases rest on the context of the instruments in question (see *Barnet v Barnet* (1861) 29 Beav 239 at 244) and are regarded as special in character (see *Ralph v Carrick* (1877) 5 ChD 984 at 995 (affd on this point (1879) 11 ChD 873, CA); *Re Stanley's Settlement*, *Maddocks v Andrews* [1916] 2 Ch 50).

2 *Dyer v Dyer* (1816) 1 Mer 414; *Re Drakeley's Estate* (1854) 19 Beav 395; *Swan v Holmes* (1854) 19 Beav 471; *Cranley v Dixon* (1857) 23 Beav 512; *Barnet v Barnet* (1861) 29 Beav 239; *Isaacson v Van Goor* (1872) 42 LJ Ch 193; *Round v Pickett* (1878) 47 LJ Ch 631; *Ralph v Carrick* (1879) 11 ChD 873, CA.

3 *White v Barber* (1771) 5 Burr 2703; *Re Lindsay* (1852) 5 Ir Jur 97; *Goodfellow v Goodfellow* (1854) 18 Beav 356 (where the effect of a subsequent codicil was not relied on).

4 *Doe d Blakiston v Haslewood* (1851) 10 CB 544 (where *White v Barber* (1771) 5 Burr 2703 was emphatically dissented from). However, see also *Re Lindsay* (1852) 5 Ir Jur 97.

5 As to such an implication see PARA 548 note 8 ante. In the case of next of kin, it was not sufficient to exclude them from any benefits under the will; as they claimed outside the will, they had to be excluded from any benefit in the testator's estate: *Re Holmes, Holmes v Holmes* (1890) 62 LT 383.

6 *Lett v Randall* (1855) 3 Sm & G 83; *Bund v Green* (1879) 12 ChD 819; *Re Wynn, Landolt v Wynn* [1983] 3 All ER 310, [1984] 1 WLR 237 (doubting *Johnson v Johnson* (1841) 4 Beav 318). See also *Re Holmes, Holmes v Holmes* (1890) 62 LT 383 (where the direction excluded named next of kin from taking under the will of the testator, not from taking on his intestacy).

7 *Re Smith, Veasey v Smith* [1948] Ch 49, [1947] 2 All ER 708.

8 *Re Cory, Cory v Morel* [1955] 2 All ER 630, [1955] 1 WLR 725; *Re Riley's Will Trusts, Riley v Riley* [1962] 1 All ER 513, [1962] 1 WLR 344.

9 *Re Riley's Will Trusts, Riley v Riley* [1962] 1 All ER 513, [1962] 1 WLR 344. See also *Re Van Den Bok Will Trusts* (1960) unreported, but referred to in *Re Riley's Will Trusts, Riley v Riley* supra. See also POWERS vol 36(2) (Reissue) PARA 209.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/755. Gift over on death to testator's successor on intestacy.

755. Gift over on death to testator's successor on intestacy.

Before 1 January 1926, where a will contained a devise of real estate after the death of a named person A to the heir-at-law of the testator, but there was no express disposition of the property during A's life, a gift to A for his life was implied. In view of the future gift to the heir-at-law it was not to be supposed that he was also to take an immediate estate by descent¹. Similarly, a bequest of personal estate after the death of a named person A to the person or persons at the date of the will² presumptively entitled in the event of the testator's intestacy gave to A a life interest, where the will contained no express disposition of the property during A's life³. It appears that, if the named person was one of the persons presumptively entitled on an intestacy, and the gift was to the rest of such persons, the same implication arose⁴.

The rule did not apply where the donee under the gift (in the case of realty) was a stranger and not the heir⁵, or was only one of several co-heirs⁶, or (in the case of personalty) was a stranger; nor did it apply where the gift was to some only of the persons presumptively entitled on intestacy⁷; nor where the donee (although the sole heir or next of kin, as the case might be) had someone else taking with him⁸.

There was no implied gift under this rule of construction where the person in whose favour the implication would arise took an express beneficial interest in the property or any part of it⁹; nor where there was an immediate residuary clause¹⁰. Apparently, the implication did not arise where the property was subject to a covenant against alienation which was not infringed as the will stood, but which would be infringed if the doctrine were applied¹¹.

As descent to the heir has been abolished, the rule in its original form cannot apply to real estate. Real estate and personal estate undisposed of by will become subject to a power of sale¹², and the net residue after payment of debts and expenses goes to the persons entitled under the modern rules as to succession on intestacy¹³. Where property, real or personal, is given after the death of A to the persons actually or presumptively entitled under the modern rules, the reasoning of the old rule would seem still to apply, and a life interest to be implied in favour of A.

1 *Gardner v Sheldon* (1671) Vaugh 259 at 263 per Vaughan CJ. See also *Anon* (1498) YB 13 Hen 7, fo 17, pl 22; *Horton v Horton* (1604) Cro Jac 74 at 75; *City of London v Garway* (1706) 2 Vern 571 per Wright, Lord Keeper; *Dashwood v Peyton* (1811) 18 Ves 27 at 40, 48 per Lord Eldon LC; *Denn d Franklin v Trout* (1812) 15 East 394; *Doe d Driver v Bowling* (1822) 5 B & Ald 722 at 727; Tudor, LC Real Prop (4th Edn) 388.

2 *Stevens v Hale* (1862) 2 Drew & Sm 22 at 28.

3 *Blackwell v Bull* (1836) 1 Keen 176 at 182; *Stevens v Hale* (1862) 2 Drew & Sm 22 at 27.

4 *Cock v Cock* (1873) 21 WR 807 (gift to children after death of mother).

5 *Rayman v Gold* (1591) Moore KB 635 (adversely commented on in *Roe d Bendall v Summerset* (1770) 2 Wm Bl 692, as reported 5 Burr 2608); *Gardner v Sheldon* (1671) Vaugh 259 (overruling Bro Abr, Devise, pl 48); *Fawlkner v Fawlkner* (1681) 1 Vern 21 at 22; *City of London v Garway* (1706) 2 Vern 571; *Aspinall v Petvin* (1824) 1 Sim & St 544; *R v Ringstead Inhabitants* (1829) 9 B & C 218 at 224-225; *Cranley v Dixon* (1857) 23 Beav 512 at 516.

6 *Barnet v Barnet* (1861) 29 Beav 239; *Re Willatts, Willatts v Artley* [1905] 1 Ch 378 (revsd on another point [1905] 2 Ch 135, CA).

7 *Re Springfield, Chamberlin v Springfield* [1894] 3 Ch 603. See also *Stevens v Hale* (1862) 2 Drew & Sm 22 at 28 (contingent class); *Woodhouse v Spurgeon* (1883) 49 LT 97; *Greene v Flood* (1885) 15 LR Ir 450. In *Cockshott v Cockshott* (1846) 2 Coll 432, the point was not raised.

8 *Ralph v Carrick* (1879) 11 ChD 873, CA, disapproving *Humphreys v Humphreys* (1867) LR 4 Eq 475 (where the gift was to a contingent class living at the death of the wife). The title of the heir was not necessarily excluded by the fact that he was expressly given a partial interest: *Camfield v Gilbert* (1803) 3 East 516. In *Willis v Lucas* (1718) 1 P Wms 472, Parker LC strongly inclined to the contrary view.

9 *Higham v Baker* (1583) Cro Eliz 15 (where the wife took express interests: (1) beneficially in part of the first property; and (2) for payment of debts in the second property, in which alone she was held entitled to an interest by implication); *Boon v Cornforth* (1751) 2 Ves Sen 277; *Aspinall v Petvin* (1824) 1 Sim & St 544 (express interest in a moiety).

10 *Stevens v Hale* (1862) 2 Drew & Sm 22 at 28.

11 *Horton v Horton* (1604) Cro Jac 74; *Dyer v Dyer* (1816) 1 Mer 414.

12 See the Administration of Estates Act 1925 s 33 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 5(1)-(5); and the Trustee Act 2000 s 40(1), Sch 2 Pt II para 27); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 555-558.

13 As to these rules see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 591 et seq.

756. Gift over after death of survivor of life tenants.

Where property is given to named persons for their respective lives, either generally or expressly as tenants in common, and is given over after the death of the survivor¹, or after 'their' death², the survivors and survivor are held to take life interests, subject to any contrary intention shown by the context³. The rule is founded either on the ground that the gift over modifies the prior words, showing that a joint tenancy was intended, or on the ground of implication in order to carry the testator's evident intention into effect⁴. The rule has been applied notwithstanding the presence of a clause substituting issue for their deceased parents⁵. There is no corresponding implication in the case of a gift, on the death of a life tenant, to two persons, with a gift over if neither of them is then living⁶.

1 See *Tuckerman v Jefferies* (1706) 11 Mod Rep 108; *Armstrong v Eldridge* (1791) 3 Bro CC 215; *Doe d Borwell v Abey* (1813) 1 M & S 428; *Pearce v Edmeades* (1838) 3 Y & C Ex 246; *Smyth v Smyth* (1855) 3 WR 189; *Begley v Cook* (1856) 3 Drew 662 at 666; *Cranswick v Pearson, Pearson v Cranswick* (1862) 31 Beav 624; *Re Richerson, Scales v Heyhoe (No 2)* [1893] 3 Ch 146 at 150; *Re Buller, Buller v Giberne* (1896) 74 LT 406 at 408; *Re Telfair, Garrioch v Barclay* (1902) 86 LT 496; *Jennings v Hanna* [1904] 1 IR 540; *Re Hobson, Barwick v Holt* [1912] 1 Ch 626 at 631; *Re Stanley's Settlement, Maddocks v Andrews* [1916] 2 Ch 50. As to gifts 'at their death' see further *Malcolm v Martin* (1790) 3 Bro CC 50; *Townley v Bolton* (1832) 1 My & K 148; *Alt v Gregory* (1856) 8 De GM & G 221. Cf *Moffatt v Burnie* (1853) 18 Beav 211. As to interests in annuities limited for the lives of two or more persons see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 818- 819. As to the distributive construction where different properties are given and the gift over is on the death of all see PARA 763 post; and as to gifts of shares in the same property see especially *Round v Pickett* (1878) 47 LJ Ch 631.

2 *Re Ragdale, Public Trustee v Tuffill* [1934] Ch 352; *Re Pringle, Baker v Matheson* [1946] Ch 124, [1946] 1 All ER 88; *Re Foster* [1946] Ch 135, [1946] 1 All ER 333.

3 *Hawkins v Hamerton* (1848) 16 Sim 410 (express gift in one contingency to survivors and their issue); *Doe d Patrick v Royle* (1849) 13 QB 100 (after the death of either of them); *Re Hobson, Barwick v Holt* [1912] 1 Ch 626 (provision for some of ultimate takers during lives of first takers).

4 See the cases cited in note 1 supra.

5 *Re Tate, Williamson v Gilpin* [1914] 2 Ch 182; followed in *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618.

6 *Baxter v Losh* (1851) 14 Beav 612.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/757. Implication of absolute interests from gifts over.

757. Implication of absolute interests from gifts over.

Implication of an absolute interest often arises from a gift over where after a prior gift¹ the property given is directed to go over in a particular event and it is taken to have been intended that it was not to go over in any other event². Thus where there is a gift to the donee until he attains a certain age, followed by a gift over to other persons on his failure to attain that age, the donee takes by implication absolutely if he attains the age³. Such a gift is not implied where the gift over and the period for which the property is held in suspense do not correspond⁴. A gift to trustees for a person until he attains a certain age, without any gift over, does not always give that person the absolute interest⁵, but it may do so if there are other indications that such is the intention⁶ and that the trust is only to point out the mode of taking⁷.

1 There is no such implication where there is no prior gift: *James v Shannon* (1868) 12 ER 118.

2 See *Re Harrison's Estate* (1870) 5 Ch App 408 at 411 per Giffard LJ; *Re Thomson's Trusts* (1870) LR 11 Eq 146; *Re Lane's Estate, Meagher v Governors and Guardians of the National Gallery of Ireland and Heaven* [1946] 1 All ER 735 (where there was a gift of a life interest which was to go over if the donee did not remarry, and this was held to give an absolute interest on remarriage). See also *Spence v Handford* (1858) 4 Jur NS 987 (where a gift of a life interest was construed as a gift of an absolute interest subject to an executory gift over in certain events).

3 *Tomkins v Tomkins* (1743) cited in 1 Burr at 234; *Wainwright v Wainwright* (1797) 3 Ves 558; *Goodright v Hoskins* (1808) 9 East 306; *Doe v Wright v Cundall* (1808) 9 East 400; *Gardiner v Stevens* (1860) 7 Jur NS 307; *Cropton v Davies* (1869) LR 4 CP 159. See also *Paylor v Pegg* (1857) 24 Beav 105 (where the donee took as heir-at-law).

4 *Savage v Tyers* (1872) 7 Ch App 356 at 364 (first gift a life estate). See also *Fitzhenry v Bonner* (1853) 2 Drew 36.

5 *Re Hedley's Trusts* (1877) 25 WR 529; *Re Arnould, Arnould v Lloyd* [1955] 2 All ER 316, [1955] 1 WLR 539. Neither of these cases was followed in *McClymont v Hooper* (1973) 47 ALJR 222, Aust HC. See also *Re Vickers* [1912] VLR 385.

6 Such a gift was held to give the absolute interest in *Newland v Shephard* (1723) 2 P Wms 194 (where no gift over occurred); disapproved in *Fonnereau v Fonnereau* (1745) 3 Atk 315 at 317 per Lord Hardwicke LC and in *Peat v Powell* (1760) Amb 387 (where on majority attained the trust was to cease). See, however, Jarman on Wills (8th Edn) pp 682-683; *Cropton v Davies* (1869) LR 4 CP 159 at 167; *Wilks v Williams* (1861) 2 John & H 125 at 128 per Wood V-C.

7 *Hale v Beck* (1764) 2 Eden 229; *Atkinson v Paice* (1781) 1 Bro CC 91; *McClymont v Hooper* (1973) 47 ALJR 222, Aust HC (not following *Re Hedley's Trusts* (1877) 25 WR 529; *Re Arnould, Arnould v Lloyd* [1955] 2 All ER 316, [1955] 1 WLR 539).

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/758. Inference from estate of trustee.

758. Inference from estate of trustee.

From the fact that some person is appointed trustee for another person simply, in circumstances such that the trustee takes an absolute interest or estate in fee simple, it may be inferred that the second person is intended to have the like interest¹.

¹ *Peat v Powell* (1760) Amb 387; *Davis v Davis* (1830) 1 Russ & M 645; *Wilks v Williams* (1861) 2 John & H 125.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/759. Bequest over on failure of children.

759. Bequest over on failure of children.

Where there is a bequest to a parent, either indefinitely or for life, followed by a bequest over if he dies without having or leaving children, or by a like bequest over referring to issue, then, on the parent's death leaving children, the court does not imply any gift to those children¹ unless there are other matters in the will raising an inference in their favour².

¹ *Scalé v Rawlins* [1892] AC 342, HL (affg *Re Rawlins' Trusts* (1890) 45 ChD 299 at 304, 306, 308, CA; and approving *Kinsella v Caffrey* (1860) 11 Ch R 154 at 160). See also *Cooper v Pitcher* (1846) 16 LJ Ch 24;

Ranelagh v Ranelagh (1849) 12 Beav 200; *Lee v Busk* (1852) 2 De GM & G 810; *Sparks v Restal* (1857) 24 Beav 218; *Neighbour v Thurlow* (1860) 28 Beav 33; *Re Hayton's Trusts* (1864) 4 New Rep 55; *Dowling v Dowling* (1866) 1 Ch App 612; *Seymour v Kilbee* (1879) 3 LR Ir 33; *Champ v Champ* (1892) 30 LR Ir 72 (where the rule was applied to a deed). The contrary decision in *Ex p Rogers* (1816) 2 Madd 449 has been doubted (see *Lee v Busk* supra; *Neighbour v Thurlow* supra; *Webster v Parr* (1858) 26 Beav 236), but can, perhaps, be explained by the special circumstances.

2 *Kinsella v Caffrey* (1860) 11 I Ch R 154; *Wetherell v Wetherell* (1862) 4 Giff 51 (on appeal (1863) 1 De GJ & Sm 134); *M'Clean v Simpson* (1887) 19 LR Ir 528.

Halsbury's Laws of England/WILLS (VOLUME 50 (2005 REISSUE))/4. CONSTRUCTION OF PARTICULAR DISPOSITIONS/(5) IMPLIED GIFTS/760. Estate tail by implication.

760. Estate tail by implication.

In a will coming into operation before 1 January 1926, an estate tail was conferred by a devise of real estate capable of being entailed¹ to a person and his heirs², followed by a devise over on his death without heirs of the body or on a general failure of his issue where the statutory presumption as to gifts on failure of issue is inapplicable or excluded by the context³. The estate tail in such a case was, however, conferred as a question of construction, 'heirs' being equivalent to heirs of the body, and the same effect would, it seems, be given to such a gift in a will coming into operation between 1 January 1926 and 31 December 1996 inclusive⁴.

Similarly, in a will coming into operation before 1 January 1926, an estate tail was conferred where there was a devise to a person without words of limitation or to him for life followed by a devise over on his death without heirs of his body or on failure of issue⁵. This was, however, an implication designed to carry out the testator's intention, and did not apply to deeds⁶. There was a presumption that the issue were intended to be benefited and the only way to give effect to that intention was to treat the first taker's interest as an estate tail⁷. A devise over on the death of a prior donee without having or leaving a son might in the same way create an estate tail by implication⁸, and, where between the interest of the prior donee and the devise over there was a devise to the eldest son of the prior donee, the effect might be to give an estate tail to the prior donee in remainder on the estate of his eldest son⁹.

There was in general no enlargement of the estate of a person by a gift over on failure of his issue where the later gift merely referred to issue taking under previous gifts, either by purchase or by descent of an estate tail; nor in general where the failure of issue was limited to a particular period¹⁰.

In all such cases between 1 January 1926 and 31 December 1996 inclusive, where before 1 January 1926 an estate tail would have been implied, the gifts take effect as gifts of the fee simple¹¹.

Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997; and any entailed interest purportedly granted on or after that date will take effect as an absolute interest¹².

1 Where the property was not capable of being entailed, as in the case of copyholds in a manor in which there was no custom to entail, the effect was in general a fee simple conditional: *Doe d Simpson v Simpson* (1838) 4 Bing NC 333; affd sub nom *Doe d Blesard v Simpson* (1842) 3 Man & G 929, Ex Ch.

2 *Soulle v Gerrard* (1596) Cro Eliz 525; *Tuttessham v Roberts* (1603) Cro Jac 22; *Brown v Jervas* (1611) Cro Jac 290; *Webb v Hearing* (1617) Cro Jac 415; *Chadock v Cowley* (1624) Cro Jac 695; *Holmes v Willett* (1681) Freem KB 483, sub nom *Holmes v Meynel* (1681) T Raym 452; *Brice v Smith* (1737) Willes 1; *Roe v Scott and Smart* (1787), cited in 1 Fearn's Contingent Remainders (10th Edn) 473n; *Denn d Geering v Shenton* (1776) 1 Cowp 410; *Doe d Ellis v Ellis* (1808) 9 East 382; *Tenny d Agar v Agar* (1810) 12 East 253; *Dansey v Griffiths* (1815) 4 M & S 61; *Doe d Jones v Owens* (1830) 1 B & Ad 318.

3 A gift over may be construed as a gift over on general failure of issue only where the general statutory rule that failure of issue is to be construed as meaning failure in the lifetime of the prior donee is inapplicable or excluded by the context: see PARA 740 et seq ante.

4 In this respect the same construction is applied to limitations in deeds: *Anon* (1341) 35 Lib Ass, pl 14; *Anon* (1441) YB 19 Hen 6, fo 73, pl 2. See also *Fisher v Wigg* (1701) 1 P Wms 14 at 15; *Bamfield v Popham* (1703) 1 P Wms 54 at 57n; *Morgan v Morgan* (1870) LR 10 Eq 99 (followed in *Arthur v Walker* [1897] 1 IR 68, where *Olivant v Wright* (1878) 9 ChD 646 is explained); and REAL PROPERTY vol 39(2) (Reissue) PARA 120. Consequently, these limitations were not affected by the Law of Property Act 1925 s 130(2) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, with effect from 1 January 1997): see PARA 671 ante. An entailed interest cannot be created by an instrument coming into operation on or after 1 January 1997: see the text and note 12 infra.

5 *Sonday's Case* (1611) 9 Co Rep 127b; *Langley v Baldwin* (1707) 1 Eq Cas Abr 185 pl 29; *A-G v Sutton* (1721) 3 Bro Parl Cas 75, 1 P Wms 754, HL; *Allanson v Clitherow* (1747) 1 Ves Sen 24; *Stanley v Lennard* (1758) 1 Eden 87; *Daintry v Daintry* (1795) 6 Term Rep 307; *Wight v Leigh* (1809) 15 Ves 564; *Parr v Swindels* (1828) 4 Russ 283; *Briscoe v Briscoe* (1830) Hayes 34 (quasi-entail in lease for lives); *Machell v Weeding* (1836) 8 Sim 4; *Simmons v Simmons* (1836) 8 Sim 22; *Franks v Price* (1840) 3 Beav 182; *Stanhouse v Gaskell* (1852) 17 Jur 157; *Key v Key* (1853) 4 De GM & G 73; *Butt v Thomas* (1855) 11 Exch 235; *Eastwood v Avison* (1869) LR 4 Exch 141 (where a contrary intention was shown and the prior donee took for life only); *Re Waugh, Waugh v Cripps* [1903] 1 Ch 744 (on death 'without an heir'). As to limiting intermediate estates to certain of the issue see *Key v Key* (1853) 4 De GM & G 73 at 81-82; *Parker v Tootal* (1865) 11 HL Cas 143 at 169-170; *Neville v Thacker* (1888) 23 LR Ir 344 at 364.

6 *Seagood v Hone* (1634) Cro Car 366 at 367; Lewis's Law of Perpetuity 180-181; 2 Preston's Estates 484; *Olivant v Wright* (1878) 9 ChD 646 at 650; *Arthur v Walker* [1897] 1 IR 68 at 76.

7 See the grounds of the rule stated in *Foster v Hayes* (1855) 4 E & B 717 at 734. It was said to be made for the purpose of giving effect to the testator's general intention: *Mathews v Gardiner* (1853) 17 Beav 254 at 257 per Romilly MR. As to general and particular intention see PARA 520 et seq ante; and as to estates tail which were formerly implied see *Parker v Tootal* (1865) 11 HL Cas 143.

8 *Milliner v Robinson* (1600) Moore KB 682 (sub nom *Bifield's Case* cited in 1 Vent at 231). See also *Wyld v Lewis* (1738) 1 Atk 432; *Raggett v Beaty* (1828) 5 Bing 243; *Bacon v Cosby* (1851) 4 De G & Sm 261; *Re Bird and Barnard's Contract* (1888) 59 LT 166.

9 *Bell v Bell* (1864) 15 I Ch R 517; *Andrew v Andrew* (1875) 1 ChD 410, CA.

10 *Lethieullier v Tracy* (1754) 3 Atk 784; *Bradshaw v Skilbeck* (1835) 2 Bing NC 182; *Jenkins v Hughes* (1860) 8 HL Cas 571 at 593. See also *Bamfield v Popham* (1703) 1 P Wms 54; *Robinson v Hunt* (1841) 4 Beav 450; *Baker v Tucker* (1850) 3 HL Cas 106; *Hamilton v West* (1846) 10 I Eq R 75; *Bridger v Ramsey* (1853) 10 Hare 320; *Foster v Hayes* (1855) 4 E & B 717 at 734, Ex Ch; *Towns v Wentworth* (1858) 11 Moo PCC 526; *Peyton v Lambert* (1858) 8 ICLR 485 at 504; *Sanders v Ashford* (1860) 28 Beav 609; *Smyth v Power* (1876) IR 10 Eq 192 at 199. Cf *Doe d Harris v Taylor* (1847) 10 QB 718 (dissenting from *Barnacle v Nightingale* (1845) 14 Sim 456, on the same will; but not followed in *Re Arnold's Estate* (1863) 33 Beav 163).

11 See the Law of Property Act 1925 s 130(2) (repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4, with effect from 1 January 1997); and PARA 671 ante.

12 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

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761. Implication of cross-remainders.

Before 1 January 1926 cross-remainders between a number of donees¹ might be implied where they or they and their issue in tail took shares in the property and the testator intended that the whole estate should go over together and only on failure of all the donees taking under the previous gifts. This intention could be carried out only by not letting any part of the estate pass as on an intestacy in the meantime and, therefore, by implying the cross-remainders². That the

testator had himself provided for the mode in which the donees took after each other, such as by expressly giving them cross-remainders in particular events, was a circumstance to be weighed as showing an intention negating implied remainders³, but was not decisive⁴.

Thus a gift to a number of persons as tenants in common in tail or to a number of persons for life with remainder as to each share to their respective issue in tail, with a gift over on failure of the issue generally of all the group of persons, might give rise to implied cross-remainders in tail⁵, although a gift over on failure of the issue of each of them had no such effect but took effect as to each share on failure of the issue concerned⁶. The same inference in favour of cross-limitations was made where the property was subject as a whole to a gift over on failure of issue confined to the life of the ancestor⁷.

As cross-remainders in tail would not before 1 January 1926 have been implied in a deed⁸, they cannot be implied in a will where the testator has died after 31 December 1925⁹. However, before 1 January 1997¹⁰ they could be created by express limitation, and, whether arising by implication under the former law or by express limitation, they would, if there is a tenancy in common, now subsist under a trust of land with a power of sale¹¹ or under an express trust for sale¹².

1 The suggestion in some old cases (collected in Tudor, LC Real Prop (4th Edn) 410-411) that cross-remainders might be implied between two, but not so readily between three or more, is no longer tenable: see the cases cited in notes 2-5 infra. As to the different rule with respect to implication of cross-remainders in the case of settlements see SETTLEMENTS vol 42 (Reissue) PARA 718.

2 *Doe d Gorges v Webb* (1808) 1 Taunt 234; *Atkinson v Holtby* (1863) 10 HL Cas 313; *Powell v Howells* (1868) LR 3 QB 654; *Hannaford v Hannaford* (1871) LR 7 QB 116; *Maden v Taylor* (1876) 45 LJ Ch 569 at 573 per Jessel MR; *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 680, HL, per Lord Macnaghten; *Re Parker, Stephenson v Parker* [1901] 1 Ch 408. See also *Ashley v Ashley* (1833) 6 Sim 358; *Taafe v Conmee* (1862) 10 HL Cas 64. The fact that the gift over is expressed to be 'in remainder' does not defeat the implication (*Doe d Burden v Burville* (1801) 2 East 47n), although it was decided otherwise where the words were 'in reversion' (*Pery v White* (1778) 2 Cowp 777), but the decision appears to have turned mainly on the supposition that 'respectively' must be inserted in the previous limitations. Cf *Doe d Patrick v Royle* (1849) 13 QB 100 at 114.

3 *Clache's Case* (1572) 3 Dyer 330b; *Rabbeth v Squire (No 2)* (1854) 19 Beav 77 (on appeal (1859) 4 De G & J 406).

4 *Atkinson v Barton* (1861) 3 De GF & J 339 at 349 per Turner LJ; revsd sub nom *Atkinson v Holtby* (1863) 10 HL Cas 313 (but without relying on the application of *Clache's Case* (1572) 3 Dyer 330b). See also *Vanderplank v King* (1843) 3 Hare 1 at 20 per Wigram V-C; *Re Clark's Trusts* (1863) 32 LJ Ch 525 at 528 per Wood V-C.

5 *Anon* (1572) 3 Dyer 303b, pl 49; *Anon* (1590) 4 Leon 14, pl 51; *Holmes v Willett* (1681) Freem KB 483, sub nom *Holmes v Meynel* (1681) T Raym 452; *Wright v Lord Cadogan* (1764) 2 Eden 239 at 250; *Wright v Holford* (1774) 1 Cowp 31; *Phipard v Mansfield* (1778) 1 Doug KB 53n; *Atherton v Pye* (1792) 4 Term Rep 710; *Burnaby v Griffin* (1796) 3 Ves 266 at 274; *Watson v Foxon* (1801) 2 East 36; *Green v Stephens* (1810) 17 Ves 64; *Skey v Barnes* (1816) 3 Mer 335 at 343 per Grant MR; *Doe d Southouse v Jenkins* (1829) 5 Bing 469; *Livesey v Harding* (1830) 1 Russ & M 636; *Brooke v Turner* (1836) 2 Bing NC 422; *Taafe v Conmee* (1862) 10 HL Cas 64; *Powell v Howells* (1868) LR 3 QB 654 at 655. See also the cases cited in note 2 supra.

6 *Comber v Hill* (1734) 2 Stra 699; *Williams v Browne* (1734) 2 Stra 996; *Davenport v Oldis* (1738) 1 Atk 579 (in which cases a gift over in default of 'such' issue was considered to mean such issue respectively; but these cases are criticised in *Watson v Foxon* (1801) 2 East 36 and might now be decided otherwise); *Re Tharp's Estate* (1863) 1 De GJ & Sm 453; *Dutton v Crowdy* (1863) 33 Beav 272. See also *Huntley's Case* (1574) 3 Dyer 326a.

7 *Maden v Taylor* (1876) 45 LJ Ch 569. It does not appear that the Wills Act 1837 s 29 affects gifts of real estate on failure of issue in cases where, apart from s 29, cross-remainders would be implied, inasmuch as in all such cases there is a preceding gift in tail to the issue or the ancestor: see PARA 742 ante.

8 *Edwards v Alliston* (1827) 4 Russ 78; *Doe d Clift v Birkhead* (1849) 4 Exch 110 at 124.

9 As to estates tail after 31 December 1925 see PARA 671 ante.

10 Entailed interests cannot be created by instruments coming into operation on or after 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; para 671 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

11 In accordance with the Law of Property Act 1925 s 34(3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 3(1), (3), in relation to dispositions to persons in undivided shares whenever made) (see REAL PROPERTY vol 39(2) (Reissue) PARA 211) and the Trusts of Land and Appointment of Trustees Act 1996 s 6(1) (see SETTLEMENTS vol 42 (Reissue) PARA 903; TRUSTS vol 48 (2007 Reissue) PARA 1035).

12 As to tenancies in common generally see REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq. Entailed interests could between 1 January 1926 and 31 December 1996 inclusive be created in personal property (see PARA 671 ante), but cannot be created by instruments coming into operation on or after 1 January 1997 (see note 10 supra). Since 1 January 1997 all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such statutorily imposed trusts for sale is now held in trust for the persons interested in the land, so that the owner of each undivided share now has an interest in land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 5, Sch 2 paras 2-5, 7 (amending the Law of Property Act 1925 ss 32, 34, 36 and the Administration of Estates Act 1925 s 33); and REAL PROPERTY vol 39(2) (Reissue) PARA 66.

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762. Implication of executory cross-limitations.

Executory cross-limitations¹ are implied to fill up a hiatus in the limitations which seems from the context to have been contrary to the testator's intention², but they cannot be implied to divest an interest given by the will³. Thus in a gift to several persons contingently on satisfying a specified condition or description as tenants in common, with a gift over on all failing to satisfy that condition or description, cross-limitations are implied on the death of each of them failing to attain that description⁴. Depending on the context, the persons between whom the cross-limitations are implied in such a case may be the original stocks, or their respective issues taking under the will⁵, or both⁶.

Although the existence of other cross-limitations between different persons does not prevent the implication⁷, where those express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention⁸.

1 The rules as to implication are stated in *Re Hudson, Hudson v Hudson* (1882) 20 ChD 406 at 415 per Kay J. As to implication of gifts for life to survivors see PARA 756 ante.

2 *Coates v Hart, Borrett v Hart* (1863) 3 De GJ & Sm 504 at 516-517 (where the issue were to take the principal of the share of which the parent took the income, and of the share of which the parent would have taken the income in case he or she had survived any other life tenant dying without issue; from this provision and from a gift over, which was to take effect only in the event of all life tenants dying without issue, it was inferred that surviving life tenants were to take the income of the share to which any life tenant dying without issue had been entitled); *Re Ridge's Trusts* (1872) 7 Ch App 665 (where the testator gave his residuary personal estate on trust to pay the income equally between his three daughters, F, E and C, during their respective lives; and, if all or any of them should die leaving issue, to pay one-third of the principal among the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally among the issue of that one daughter; but if all the daughters should die without leaving issue, then over; and it was held that cross-limitations were to be implied between the daughters and their families, and the issue of each daughter were, for all purposes, to be ascertained at her own death, and therefore one moiety of F's share was payable to the issue of C living at C's death and the other moiety went by way of accretion to E's original share). The case converse to *Coates v Hart, Borrett v Hart* supra, namely, where there was an express gift of income and the question was whether a gift of capital could be implied to the issue of life tenants leaving issue, was decided against implication in *Re Mears, Parker v Mears* [1914] 1 Ch 694. See also *Re Riall, Westminster Bank Ltd v Harrison* [1939] 3 All ER 657 (where the estate was divided into two parts, the income of each part given to a different life tenant, with a gift over on the death of

the last survivor; and it was held that after the death of one life tenant the survivor was entitled to the whole income for the rest of her life); *Re Hart's Will Trusts, Public Trustee v Barclays Bank Ltd* [1950] Ch 84, [1949] 2 All ER 898 (where there was a division of the estate into two-sixths and four-sixths, with provision for accrual of the two-sixths to the four-sixths but not of the four-sixths to the two-sixths, and it was held that the cross-limitation must be implied).

3 *Skey v Barnes* (1816) 3 Mer 335 at 343 per Grant MR; *Bromhead v Hunt* (1821) 2 Jac & W 459; *Baxter v Losh* (1851) 14 Beav 612; *Beaver v Nowell* (1858) 25 Beav 551; *Re Clark's Trusts* (1863) 32 LJ Ch 525.

4 Eg contingently on attaining 21 (*Scott v Bargeman* (1722) 2 P Wms 68 (gift over on death before legacies payable); *Mackell v Winter* (1797) 3 Ves 236, 536), or 21 or marriage (*Re Clark's Trusts* (1863) 32 LJ Ch 525; followed in *Re Bickerton's Settlement, Shaw v Bickerton* [1942] Ch 84, [1942] 1 All ER 217), or in the event of surviving a named person (*Graves v Waters* (1847) 10 I Eq R 234). In *Skey v Barnes* (1816) 3 Mer 335, *Scott v Bargeman* supra was criticised on another ground by Grant MR, who, however, said that he considered the decision correct. See also *Vize v Stoney* (1841) 1 Dr & War 337 at 348.

5 *Atkinson v Holtby* (1863) 10 HL Cas 313 (revsg *Atkinson v Barton* (1861) 3 De GF & J 339).

6 *Roe d Wren v Clayton* (1805) 6 East 628. See also *Burnaby v Griffin* (1796) 3 Ves 266; *Horne v Barton* (1815) 19 Ves 398 (where an express direction for cross-remainders was so construed).

7 *Re Clark's Trusts* (1863) 32 LJ Ch 525.

8 *Rabbeth v Squire* (1859) 4 De G & J 406 at 413-414. Cf *Sutton v Sutton* (1892) 30 LR Ir 251, Ir CA.

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763. Distributive construction.

Cases where particular property is given to one person for life and after his death that property with other property not expressly disposed of during his life is given to other persons, and the question is what happens to that other property during the first person's life, are to be distinguished from cases of implication, where the question is rather whether the words alluding to the time of death are to be referred distributively¹ and to be confined to the property given to the life tenant, in which event the ultimate donees will take an immediate estate in the remainder of the property². Instead of implying cross-remainders, a similar construction may be adopted where a fund is given to each of several donees for life and there is a general gift over of the whole fund on the deaths of all the donees so as to carry each portion of the fund to the remainderman on the death of the life tenant of that portion³. If the words cannot be read distributively, the persons entitled as on intestacy cannot be excluded⁴.

1 See *Rhodes v Rhodes* (1882) 7 App Cas 192, PC (where it was held that words are to be construed according to their plain, ordinary meaning unless the context shows them to have been used in a different sense or unless the rule, if acted on, would lead to some manifest absurdity or incongruity). The testator must be presumed not to have intended an absurdity; nevertheless, if he is shown by the context or by the whole will to have so intended, the intention, if not illegal, must be carried out.

2 *Doe d Annandale v Brazier* (1821) 5 B & Ald 64. See also *Cook v Gerrard* (1668) 1 Saund 180; *Simpson v Hornby* (1716) Gilb Ch 115 at 120, sub nom *Sympton v Hornsby* Prec Ch 439 at 452; *Lill v Lill* (1857) 23 Beav 446 (distinguished in *Jennings v Hanna* [1904] 1 IR 540); *Rhodes v Rhodes* (1882) 7 App Cas 192, PC.

3 *Re Browne's Will Trusts, Landon v Brown* [1915] 1 Ch 690. See also *Drew v Killick* (1847) 1 De G & Sm 266; *Swan v Holmes* (1854) 19 Beav 471; *Sarel v Sarel* (1856) 23 Beav 87; *Re Motherwell, Keane v Motherwell* [1910] 1 IR 249.

4 *R v Ringstead Inhabitants* (1829) 9 B & C 218 at 233; *Attwater v Attwater* (1853) 18 Beav 330 at 338. See *Davenport v Coltman* (1842) 9 M & W 481; and subsequent proceedings 12 Sim 588 (where the Court of Chancery approved the judgment of the Court of Exchequer). See also *Stevens v Pyle* (1860) 28 Beav 388; *Round v Pickett* (1878) 47 LJ Ch 631.

